

36
4

PRINCIPLES AND DIGEST OF THE LAW OF EVIDENCE

BEING
A COMMENTARY ON THE INDIAN EVIDENCE ACT (I OF 1872)

M. MONIR

47.06
M74P

THE UNIVERSITY BOOK AGENCY, ALLAHABAD

**PRINCIPLES AND DIGEST
OF THE
LAW OF EVIDENCE
BEING
A COMMENTARY ON THE INDIAN EVIDENCE ACT (I OF 1872)**

By
M. MONIR, M.A., LL.B.
CHIEF JUSTICE, SUPREME COURT OF PAKISTAN

FIFTH EDITION

By
H. S. URSEKAR, M.A., LL.B.

VOLUME II
Sections 32 to 55

THE UNIVERSITY BOOK AGENCY
LAW BOOK PUBLISHERS
ELGIN ROAD — POST BOX 63 — ALLAHABAD 211 001

CONTENTS OF VOLUME II

COMMENTARY ON THE EVIDENCE ACT

SECTIONS 32 to 55	407 to 686
-------------------	----	----	----	------------

STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES

32 Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases :—

1 (1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

When it relates to cause of death;

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

(2) When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities, or property of any kind; or of a document used in commerce written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.

(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

or against interest of maker;

(4) When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter has arisen.

or gives opinion as to public right or custom, or matters of general interest;

(5) When the statement relates to the existence of any relationship¹ [by blood, marriage or adoption] between persons as to whose relationship¹ [by blood, marriage or adoption] the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

(6) When the statement relates to the existence of any relationship¹ [by blood, marriage or adoption] between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

(7) When the statement is contained in any document relating to transaction mentioned in section 13, clause (a); or in deed, will or other document which relates to any such transaction as is mentioned in section 13, clause (a).

(8) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

Illustrations

(a) The question is, whether A was murdered by B; or

A dies of injuries received in a transaction in the course of which she was ravished. The question is whether she was ravished by B; or

The question is whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape and the actionable wrong under consideration, are relevant facts.

(b) The question is as to the date of A's birth.

An entry in the diary of a deceased surgeon regularly kept in the course of business, stating that, on a given day he attended A's mother and delivered her of a son, is a relevant fact.

1. Inserted by section 2 of the Indian Evidence Act, Amendment Act (18 of 1872).

(c) The question is, whether A was in Calcutta on a given day.

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that on a given day the solicitor attended A at a place mentioned, in Calcutta, for the purpose of conferring with him upon specified business, is a relevant fact.

(d) The question is, whether a ship sailed from Bombay harbour on a given day.

A letter written by a deceased member of a merchant's firm by which she was chartered to their correspondents in London, to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(e) The question is, whether rent was paid to A for certain land.

A letter from A's deceased agent to A, saying that he had received the rent on A's account and held it at A's orders, is a relevant fact.

(f) The question is, whether A and B were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

(g) The question is, whether A, a person who cannot be found, wrote a letter on a certain day. The fact that a letter written by him is dated on that day, is relevant.

(h) The question is, what was the cause of the wreck of a ship.

A protest made by the Captain, whose attendance cannot be procured, is a relevant fact.

(i) The question is, whether a given road is a public way.

A statement by A, a deceased headman of the village, that the road was public, is a relevant fact.

(j) The question is, what was the price of grain on a certain day in a particular market. A statement of the price, made by a deceased banya in the ordinary course of his business, is a relevant fact.

(k) The question is, whether A, who is dead, was the father of B.

A statement by A that B was his son is a relevant fact.

(l) The question is, what was the date of the birth of A.

A letter from A's deceased father to a friend, announcing the birth of A on a given day, is a relevant fact.

(m) The question is, whether, and when, A and B were married.

An entry in a memorandum-book by C, the deceased father of B, of his daughter's marriage with A on a given date, is a relevant fact.

(n) A sues B for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

COMMENTARY

Statements by persons who cannot be called as witnesses: ground of admissibility.—The general rule is that all oral evidence must be direct viz., if it refers to a fact which could be seen it must be the evidence of the witness who says he saw it; if it refers to a fact which could be heard, it must be the evidence of the witness who says he heard it; if it refers to a fact which could be perceived by any other sense, it must be the evidence of the witness who says he perceived it by that sense; if it refers to an opinion, it must be the evidence of the witness who holds that opinion.² The eight clauses of this section are exceptions to the general rule against hearsay just stated.³ When a person deposes to a fact in Court, he speaks under the sanction of oath, he is liable to prosecution for perjury, and his statement can be tested by cross-examination. There is, thus, some sort of guarantee of the truth of his statement. In the case of statements declared relevant by the present section, these safeguards for truth are absent, as the maker of the statement is not examined as a witness at all; but the nature of the statement itself and the circumstances under which it is made make probable the truth of the statement, and thus take the place of oath and cross-examination.⁴ The section relates only to the relevancy of evidence and not to the manner of its proof⁵ and the burden of proving the circumstances that make the statement relevant under the section is on the party that relies on the statement.⁶ Section 32 is not controlled by section 33 of the Act.⁷

Statements made by signs or gestures.—Signs made by a person, who is conscious though unable to speak, in answer to questions, amount to verbal statements.⁸ Where a woman, with her throat partially cut and unable to speak, makes gestures in answer to questions and indicates the person who has wounded her, the gestures are admissible; but the interpretation of the gestures is for the Court alone, and the opinion of witnesses as to the meaning of gestures is inadmissible.⁹

Statements of relevant facts; statements of facts in issue.—The Bombay High Court has held that where the statement refers to a fact in issue, as distinguished from a relevant fact, the statement is inadmissible under this section:¹⁰ but it is submitted that though the expression “relevant facts” is used in the Act in contradistinction to “facts in issue”,¹¹ the different clauses of this section and the illustrations to it seem to show that in this section the expression was intended to include facts in issue.¹²

2. Section 60.

3. *Mst. Biro v. Atma Ram*, 1937 P.C. 101: 64 I.A. 92.

4. *Soney Lall Jha v. Darbdeo Narain Singh*, 14 P. 461: 1935 P. 167: 155 I.C. 470.

5. *Dogar Mal v. Sunam Ram*, 1944 L. 58; *Nagaraja Rao v. Koothappan*, 1941 M. 602: 53 M.L.W. 634.

6. *Abdul Gani v. E.*, 1943 C. 465: I. L.R. (1943) I.C. 423.

7. *Aboobucker v. Sahib Khatoon*, 1949 S. 12; *Shyamanand Das v. Rama Kanta Das*, 32 C. 6; *Sulaiman v. The King*, 1941 R. 301: 43 Cr. L.J. 123.

8. *Alexander Perera Chandrasekera v. King*, 1937 P.C. 24: 166 I.C. 330: 38 Cr. L.J. 281; *Ranga v. E.*, 5 L.

305: 84 I.C. 522: 1924 L. 531: 26 Cr. L.J. 328; *E. v. Sadhu Charan Das*, 49 C. 600: 77 I.C. 993: 1922 C. 409: 25 Cr. L.J. 529; *Q. E. v. Abdullah*, 7 A. 385 (F.B.).

9. *Darpan Potdarin v. E.*, 1938 P. 153; *Chandrika Ram Kahar v. E.*, I.P. 401: 71 I.C. 353: 1922 P. 535. 24 Cr. L.J. 129.

10. *Patel Vandran Jekisan v. Patel Manilal Chunilal*, 15 B. 565.

11. See sections 3 and 5.

12. See the judgment of Abdul Rahim, J. in *Raghubhushana Tirthaswami v. Vidiavaridhi Tirthaswami*, 34 I. C. 875, 880 and *Jadavkumar Lildhar Mainthia v. Pushpabai Mainthianee*, 1944 B. 29: 211 I.C. 315.

Joint statements by persons deceased and persons alive.—Where a statement is made by several persons, e.g., where a document is executed by several persons, each person must be taken to have made the statement for himself, and if one or more of such persons have died, while the rest are alive, the statement becomes admissible as the statement of a deceased person.¹³

Competency and credibility of the maker of the statement.—It does not seem to be necessary that the person whose statement is admitted under this section should be competent to testify.¹⁴ In the case of dying declarations, the English rule is to the contrary;¹⁵ but it is doubtful if the English rule is applicable to India.¹⁶ The credit of the person whose statement is admitted under this section may be impeached or confirmed in the same way as that of a witness actually examined in Court.¹⁷ Thus, where a person has made two statements as to the transaction which resulted in his death, one may be used to contradict as well as to corroborate the other.¹⁸

Statements inadmissible under section 32, whether admissible under section 11, section 14, or any other section.—If a statement is inadmissible under section 32 by reason of the fact that its maker is alive and has not been called as a witness¹⁹ or because the statement does not fall within the terms of any clause of section 32,²⁰ it cannot be held relevant under section 11.²¹ But if the statement relates to the mental state of its maker, it is admissible both under section 11 and section 14, even though section 32 be inapplicable to such a case.²² There is no legal objection to the admissibility of the statement as to the conduct under section 8, when it is not admissible under section 32 of the Act.²³ See notes to sections 11, 14 and 21.

Statements admitted under section 32 are substantive evidence.—If the maker of a statement is examined as a witness, ordinarily his previous statement is admissible merely to corroborate or contradict his testimony in Court, but it is not substantive evidence.²⁴ If, however, he cannot be called as a witness by reason of any of the circumstances men-

13. Chandra Nath Roy v. Nilmadhab Bhattacharjee, 26 C. 236.

14. For competency to testify, see section 118.

15. R. v. Pike, (1829) 3 C. & P. 598.

16. See Cunningham, 161, 162.

17. Section 158; Niamat Khan v. E., 127 I.C. 850: 1930 L. 409: 32 Cr. L.J. 51.

18. Niamat Khan v. E., 127 I.C. 850: 1930 L. 409: 32 Cr. L.J. 51.

19. Munna Lal v. Kameshri Dat, 114 I.C. 801: 1929 O. 113.

20. Latafat Husain v. Onkar Mal, 152 I.C. 1042: 1935 O. 41; Naima Khatun v. Basant Singh, 149 I.C. 781: 1934 A. 406 (F.B.); Bela Rani v. Mahabir Singh, 34 A. 341. 14 I.C. 116; see Ramchandra v. Rambai, 123 I.

C. 907: 1930 N. 267; Bhagbhari v. Khatun, 80 I.C. 118: 1921 S. 177; Luchiram Motilal v. Radha Charan Poddar, 49 C. 93: 66 I.C. 15: 1922 C. 267.

21. Naima Khatun v. Basant Singh, 149 I.C. 781: 1934 A. 406 (F.B.); Ambica Charan Kundu v. Kumud Mohan Chaudhury, 110 I.C. 521: 1928 C. 893; but see Lachman Lal Pathak v. Kamakshya Narayan Singh, 131 I.C. 788: 1931 P. 224.

22. Leong Hone Waing v. Leon Ah Foon, 7 R. 720: 121 I.C. 796: 1930 R. 42.

23. Chennupati Venkatasubbamma v. Nelluri Narayanaswami, 1954 M. 215.

24. See sections 155 and 157.

tioned in this section, his previous statement, if it falls within any of the clauses to this section, becomes admissible as substantive evidence.²⁵

Condition precedent to the admissibility of statements under section 32.—The provisions of this section are in the nature of exceptions and the onus of establishing circumstances that would bring a statement within any of the exceptions contemplated by the section lies clearly upon the party which wishes to avail itself of the statement.²⁶ If a statement is sought to be given in evidence under the provisions of this section, the party seeking to tender such statement in evidence has to show that the maker of the statement is dead, or that he cannot be found, or that he has become incapable of giving evidence, or that he cannot be called as a witness without unreasonable delay or expense.²⁷ Section 10 A of the Dekhan Agriculturists' Relief Act, does not override the provisions of section 32 of the Evidence Act. When a letter written by a person who does not appear in Court, is required to be admitted in evidence, it ought to be shown that it came within any of the clauses of section 32 of the Evidence Act.²⁸ See notes to section 33.

"Statements made by a person who is dead."—Death must be proved, unless, under section 103, it is presumed to have occurred. If it is not proved that the maker of the statement is dead, or if he is alive, the statement is inadmissible, the section not being applicable.²⁹ In a recent case a Girdawar Qanungo appointed about 70 years ago to hold enquiry as to relationship of parties was presumed to have died.³⁰ But if the statement is made by several persons, e.g., where a document is executed by several persons, one or more of whom have died and the rest are alive, the section is applicable and the statement is admissible as that of a deceased person or persons.³¹ If, at the time a party closes his case, a person is alive but is not called as a witness, the subsequent death of such person will not entitle the party to tender in evidence any previous statement of such person³² and if a person has actually been called, examined and cross-examined as a witness, the death of such person before the termination of the suit will not entitle a party to tender in evidence any previous statement of such person under the provisions of this section.³³ See also notes to section 33.

Who cannot be found.—A person who may be said to have been not found when it is known who he was and if in spite of search he was not found or was found to have been dead. But he may equally be said not

25. *Charitter Rai v. Kailash Behari*, 44 I.C. 422; see also *Jonab Biswas v. Siva Kumari Debi*, 104 I.C. 733: 1927 C. 855.

26. *Abdul Gani v. F.*, 1943 C. 465: 47 C.W.N. 332: 209 I.C. 105: I.L.R. (1943) I.C. 423.

27. See section 104; *Surpat Singh v. Gend Jha*, 1926 P. 315: 162 I.C. 999; *Karapaya Servai v. Mayandi*, 147 I.C. 414: 1933 R. 212; *Mohan Lal v. Tulsan*, 109 I.C. 774: 1928 L. 824; *Lukhan Chandra Mandal v. Takim Dhali*, 80 I.C. 357: 1924 C. 558.

28. *Gurunath Madhav v. Mallappa Shantappa*, 1950 B. 340: 52 B.L.R. 288.

29. *Munna Lal v. Kameshri Dat*, 114 I.C. 801: 1929 O. 113; *Mehr Dad v. Muhammad Ali Shah*, 84 I.C. 927: 1925 L. 63.

30. *Pritam Singh v. Tilok Singh*, 1954 Pepsu 14.

31. *Chandra Nath Roy v. Nilmadhab Bhattacharjee*, 26 C. 236.

32. *Jagatpal Singh v. Jageshar Baksh Singh*, 25 A. 143: 36 I.A. 27 (P.C.).

33. *Sahdeo Narain v. Kusum Kumari*, 46 I.C. 929.

to have been found if his identity cannot be traced or found.³⁴ See notes to section 33.

Who has become incapable of giving evidence.—See notes to section 33.

Whose attendance cannot be procured without unreasonable delay or expense.—See notes to section 33.

CLAUSE (1): DYING DECLARATIONS

Principle and reason of the rule.—This clause makes relevant what, in English law, are called “dying declarations” i.e., statements made by a person as to the cause of his death or as to the circumstances of the transaction resulting in his death. The grounds of admission are: firstly, necessity, for the victim being generally the only principal eye-witness to the crime, the exclusion of his statement might defeat the ends of justice; and, secondly, the sense of impending death, which creates a sanction equal to the obligation of an oath. “The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of justice”.³⁵

What is a dying declaration and its weak points and principle of its admission.—The dying declaration is a statement by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death and it becomes relevant under Section 32(1) of the Evidence Act in a case in which the cause of that person's death comes into question. It is true that a dying declaration is not a deposition in Court and it is neither made on oath nor in the presence of the accused. It is, therefore, not tested by cross-examination by way of an exception to the general rule against the admissibility of hearsay evidence, on the principle of necessity. The weak points of a dying declaration just mentioned merely serve to put the Court on its guard while testing its reliability, by imposing on it an obligation to closely scrutinise all the relevant attendant circumstances.³⁶

Difference between the Indian rule and the English rule; declaration need not have been made under expectation of death.—The Indian law on the subject of dying declarations differs from the English law in two important particulars. Firstly, in English law, a dying declaration is admissible only on a criminal charge of homicide or manslaughter, whereas in India it is admissible in all proceedings, civil or criminal, provided that the cause of the declarant's death comes into question in those proceedings.³⁷ Secondly, under the English law, the declaration should have

34. Dogar Mal v. Sunam Ram, 1914 L. 58: 212 I.C. 416: 45 P.L.R. 441.

35. Per Eyre, L.C.B., in R. v. Woodcock, (1789) 1 Leach 500.

36. Tapinder Singh v. State of Punjab, (1971) (1) S.C.J. 751.

37. Lalji Dusadh v. E., 6 P. 747: 106 I.C. 698: 1928 P. 162: 29 Cr. L.J. 106; State v. Kanchan Singh, 1954 A. 153: 1954 Cr. L.J. 264: 153 A. L.J. 615.

been made under the sense of impending death, whereas, under the Indian law, it is not necessary for the admissibility of a dying declaration that the deceased at the time of making it should have been under expectation of death.³⁸

Competency and credibility of the declarant.—Under the English law, the declarant must have been competent as a witness;³⁹ thus imbecility or tender age will exclude the declaration.⁴⁰ It is, however, doubtful whether this rule is applicable in India, though there can be no doubt that the declaration of a person not competent to testify will carry little weight.⁴¹ The credit of the declarant may be impeached or confirmed in the same way as that of a witness actually examined in Court.⁴² Thus, where the deceased has made two statements as to the transaction which resulted in his death, one may be used to contradict as well as to corroborate the other.⁴³

Statements made before injuries.—In a case where the deceased had made two statements, one 10 days and the other about 8 or 9 months before her death, the Lahore High Court held, that this clause of section 32 covers only “dying declarations”, that is to say, statements made by a dying person as to the injuries which have brought him to that condition, or as to the circumstances under which those injuries came to be inflicted, and that it has no application to any statements made by that person some time before he was attacked or injured.⁴⁴ In some cases it has been held that this clause seems to apply only to such statements of the deceased as are made subsequent to the injuries sustained by him. In section 32(1), the fact of death is the *res gestae*, the main fact, and only those circumstances which constitute or accompany this main fact can be regarded as forming part of the transaction. These incidents, therefore, must be intimately connected with the immediate cause of death, *viz.*, the injury which results in death; and only such facts as are within the knowledge of the injured person as being intimately and immediately connected with the injury are primarily contemplated by the section. The section cannot have the effect of making relevant facts or series of facts which have no direct relation to death. Consequently, statements made by the deceased some days prior to the event which resulted in his death are excluded by section 32 (1). So also statements made by the deceased some days prior to the murder, which prove the motive of, or preparation for, the offence or the agreement to commit the offence are inadmissible, as the “transaction” contemplated by the clause does not commence until the offence is

38. *Inayat Khan v. E.*, 16 L. 589: 158 I.C. 336: 1935 L. 94; *E. v. Akbarali Karimbhai*, 58 B. 31: 146 I.C. 548: 1933 B. 479 (2): 35 Cr. L.J. 109; *Rego v. E.*, 143 I.C. 17: 1933 N. 136: 34 Cr. L.J. 505; *E. v. Premnanda Dutt*, 52 C. 987: 88 I. C. 1000: 1925 C. 876: 26 Cr. L.J. 1256; *State v. Kanchan Singh*, 1954 A. 153: 1954 Cr. L.J. 264: 1953 A. L.J. 615; *Mian Khan v. Crown*, P. L.D. 1954 L. 646.

39. For competency, see section 118.

40. *R. v. Drummond*, (1784) 1 Leach C.C. 338.

41. See *Cunningham*, 161-162.

42. Section 158; *Niamat Khan v. E.*, 127 I.C. 850: 1930 L. 409: 32 Cr. L.J. 51; *Hari Kishan v. State*, 1955 Punj. 25.

43. *Niamat Khan v. E.*, 127 I.C. 850: 1930 L. 409: 32 Cr. L.J. 51.

44. *Autar Singh v. E.*, 4 L. 451: 81 I. C. 964: 1924 L. 253: 25 Cr. L.J. 1140; the view that this clause of the section applies only to a statement made by a “dying man” has been differed from in a subsequent decision of the Lahore High Court, *i.e.*, *Inayat Khan v. E.*, 16 L. 589: 158 I.C., 336: 1935 L. 94.

actually attempted.⁴⁵ But this view has not found favour with the Bombay High Court, where it has been held that the clause is wide enough to include statements made by a deceased person to another, before receiving the injuries, as to the circumstances under which he was accompanying the accused to the place where the murder was committed.⁴⁶ A similar view of this matter has been taken in Oudh,⁴⁷ and the authority of the Lahore case has been shaken by a subsequent decision of the same Court.⁴⁸ The Privy Council has definitely disapproved of the view that this clause only applies to statements made after the injuries. The phrase "circumstances of the transaction" no doubt conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes evidence of all facts. It is on the other hand narrower than "*res gestae*". Circumstances must have some proximate relation to the actual occurrence: though, as for instance, in a case of prolonged poisoning they may be related to dates at a considerable distance from the date of the actual fatal dose. It is not necessary that there should be a known transaction other than that the death of the declarant has ultimately been caused, for the condition of the admissibility of the evidence is "that the cause of (the declarant's) death comes into question". General expressions indicating fear or suspicion, whether of a particular individual or otherwise, and not directly related to the occasion of the death will not be admissible. But statements made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him would each of them be circumstances of the transaction, and would be so whether the person was unknown, or was not the person accused. Such a statement might indeed be exculpatory of the person accused. The statement admissible under this clause may be made before the cause of death has arisen, or before the deceased has reason to anticipate being killed.⁴⁹ The expression "any of the circumstances of the transaction which resulted in his death" is wider in scope than the expression "the cause of his death" and the words "resulted in his death" do not mean "caused his death".⁵⁰ Where the deceased reported to the police an assault on him by the accused, and next morning, in the course of altercation, the accused stabbed the deceased, it was held that the report made by the deceased was admissible under this clause.¹ Similarly, statements by a person about his own ill-treatment, made before he committed suicide, have been held to be admissible.² Letters written by the deceased husband three years before his death referring to certain incidents indicating strained feelings between him and his wife, and the diary of the deceased containing entries relating to the arrival and stay of the paramour of his

45. *Rego v. E.*, 143 I.C. 17: 1933 N. 136: 34 Cr. L.J. 505; *E. v. Eddula Venkata Subba Reddi*, 54 M. 931: 134 I.C. 1143: 1931 M. 689: 33 Cr. L.J. 51; see also *Harendra Kumar Mandal v. E.*, 66 C.L.J. 196: I.L.R. 1938 C. 125; *Public Prosecutor v. Munigan*, 1941 M. 359; *In re Baggam Appalanarasayya*, 1941 M. 101: 192 I.C. 586: I.L.R. 1941 M. 81.

46. *Shivabhai Becharbhai v. E.*, 50 B. 683: 97 I.C. 660: 1926 B. 513: 27 Cr. L.J. 1140.

47. *Lekha Singh v. E.*, 140 I.C. 892: 1933 O. 53: 34 Cr. L.J. 101.

48. *Inayat Khan v. E.*, 16 L. 589: 158 I.C. 336: 1935 L. 94.

49. *Narayana Swami v. E.*, 1939 P.C. 47; *Dr. Jai Nand v. Rex*, 1949 A. 291: 1949 A.L.J. 60: 50 Cr. L.J. 498.

50. *State v. Ramprasad Singh*, 1953 P. 354: 1953 Cr. L.J. 1751.

1. *Chunilal v. E.*, 88 I.C. 353: 1924 N. 115: 26 Cr. L.J. 1121; but see *Rego v. E.*, 143 I.C. 17: 1933 N. 136: 34 Cr. L.J. 505.

2. But see, *Gokul Chandra Chatterji v. State*, 1950 C. 306: 51 Cr. L.J. 1201; *E. v. Faiz*, 20 P.R. 1916 Cr.: 35 I.C. 998: 17 Cr. L.J. 438.

wife and the incidents which occurred during that period, were held admissible as mentioning circumstances which resulted in the death of the husband.³ Where the accused are being tried for conspiracy to murder a particular person, who is alleged to have been murdered, a petition of complaint made by him to the police, speaking of serious apprehension of danger to his life, is probably admissible under this clause.⁴

Substance of the declaration.—The statement must relate to the cause of the declarant's death, or to any of the circumstances of the transaction which resulted in his death.⁵ A statement of the deceased that he was going to the house of the accused to release his cow which the accused had confined, made just before the quarrel over the recovery of the cow is a statement as to a circumstance of the transaction which resulted in the death of the deceased.⁶ A statement by a witness that the deceased had told him of a rumour that an amount had been offered by the accused for the deceased's head, is not admissible as a dying declaration. It is not a statement as to the cause of the deceased's death or as to any of the circumstances of the transaction which resulted in his death.⁷ A statement made by the widow in her evidence before the Commissioner for Workmen's Compensation that she had heard from her husband, who was then dead as a result of injuries received in an accident while going to the factory, that the bicycle on which he met with the accident had been given to him by his employer because otherwise he might be late in attending the factory, is not admissible.⁸ Therefore, where the declarant survives the injuries, the declaration is inadmissible under this clause, though it may be proved to corroborate or contradict his testimony if he is examined in Court.⁹ Where there is nothing to show that the injury to which the statement relates was the cause of the injured person's death or that the circumstances under which it was received resulted in his death, the statement will not be admissible.¹⁰ If death is not caused or accelerated by the injuries but is due to an independent supervening cause, e.g., pneumonia, the statement will be rejected.¹¹ If a woman is raped, and she decides three days later to commit suicide, the rape is not the cause of her death, though it may be the contingent motive. Therefore, a statement alleged to have been made by the woman soon after the occurrence cannot be admitted as a dying declaration.¹² If, however, the declarant lingers for a few days and ultimately dies of the injuries, the statement will be admissible.¹³ The statement of a dying dacoit as to the circumstances of the dacoity which resulted in his death, and giving the names of his associates, is a statement as to the circumstances of the transaction which resulted in his death; but such statement is inadmissible under this clause, for the reason that the cause of his death is not an issue in the

3. *Ranjit Singh v. State*, 1952 H.P. 81; see also *Findal v. State*, 1954 H.P. 11.

4. *Golok Behari Takal v. E.*, 42 C.W.N. 129.

5. *Wali Mohammad v. E.*, 126 I.C. 511; 1930 O. 249; 31 Cr. L.J. 1025 Q.E. v. *Surendra Nath Sarkar*, 28 C. 397; 5 C.W.N. 574.

6. *Satish Chandra Saha v. State*, 1954 C. 379.

7. *Ramkrishna Roy v. State*, 1952 C. 231; 1952 Cr. L.J. 1248.

8. *Messrs. Tobacco Manufacturers*

(India) Ltd. v. *Mrs. Marian Stewart*, 1950 C. 164.

9. *E. v. Rama Sattu*, 4 Bom. L.R. 434.

10. *Abdul Gani Bandukchi v. E.*, 1943 C. 465.

11. *Wali Mohammad v. E.*, 126 I.C. 511; 1930 O. 249; 31 Cr. L.J. 1025; *Imperatrix v. Rudra*, 25 B. 45.

12. *Kappinaiah v. E.*, 131 I.C. 456; 1931 M. 233 (2); 32 Cr. L.J. 751.

13. *Thakar Singh v. E.*, 113 I.C. 177, 1929 L. 64; 30 Cr. L.J. 65.

trial of his associates for dacoity.¹⁴ A dying declaration is admissible in evidence only where the death of the declarant is the subject-matter of the charge and the circumstances of the death are the subject of the declaration.¹⁵ A declaration may not, however, include hearsay or irrelevant matter; though opinions have been received.¹⁶ Statements by the deceased as to the cause of his death are admissible, not only against the person who actually caused the death of the deponent but also against other persons concerned in the transaction which resulted in the deponent's death.¹⁷ When the deceased has made a statement as to the circumstances of the transaction which ended in his death, the fact that he has also referred therein to the enmity caused by his acting as a wizard, as a motive for the attack, does not make the statement anything other than a statement relating to the cause of his death or render the same inadmissible.¹⁸

Cause of declarant's death must be in issue in case in which the declaration is sought to be given in evidence.—A dying declaration becomes admissible under this clause only when the cause of the declarant's own death comes into question,¹⁹ and not when the subject of the inquiry is the death of another person,²⁰ or any other different matter.²¹ Therefore, the statement of a deceased person, in which he does not charge the accused with having wounded him, but charges him with having wounded another person whose death is the subject-matter of the charge against the accused, is inadmissible.²² Similarly, where a deceased dacoit who was injured in the course of the dacoity made a statement giving the names of his associates, the statement was held inadmissible at the trial of his associates for dacoity, as the question in the trial was not the death of the deceased dacoit but the participation of his associates in the dacoity.²³ In cross-cases a dying declaration is not admissible against the member of the party of the deceased, but is admissible only so far as it relates to the circumstances of his own death.²⁴ In a trial for robbery the statement of a deceased victim of the robbery regarding the circumstances of the robbery is relevant even though death was caused remotely by the wounds received at the robbery.²⁵ The nature of the proceeding in which the cause of the death of the person making the statement comes into question need not necessarily be a charge of murder or homicide. It may be a charge of a different nature or it may be a civil action. The only material point is that the cause of death must come into question irrespective of the nature of the proceeding in which it comes into question. Hence where the cause of the death of the deceased has come into question, the mere fact that the charge of murder failed and was not brought

14. *Dannu Singh v. E.*, 85 I.C. 643: 1925 A. 227: 26 Cr. L.J. 547.

15. *Fakir v. E.*, 17 P.R. 1901 Cr.

16. *Phipson, Ev.*, 4th Ed., 140; but see *Lekha Singh v. E.*, 140 I.C. 892: 1933 O. 53: 34 Cr. L.J. 101, where it has been observed that the rule admitting dying declarations is subject to the rule against hearsay.

17. *Nga Hla Din v. E.*, 1936 R. 187: 162 I.C. 491: 37 Cr. L.J. 621.

18. *E. v. Somra Bhuian*, 16 P. 593: 937 P.W.N. 897.

19. *Nobin Krishna Mookerjee v. Ros-sick Lall Laha*, 10 C. 1047.

20. *Fakir v. E.*, 17 P.R. 1901 Cr.;

Saudagar Singh v. E., 1944 L. 377; *Kunwarpal Singh v. E.*, 1948 A. 170: 1947 A.L.J. 627: 49 Cr. L.J. 140: I.L.R. 1948 A. 122.

21. *Dannu Singh v. E.*, 85 I.C. 643: 1925 A. 227: 26 Cr. L.J. 547.

22. *Fakir v. E.*, 17 P.R. 1901 Cr. In *re Peria Chelliab Nadar*, 1942 M. 450; *Kunwarpal Singh v. E.*, 1947 A. 170.

23. *Dannu Singh v. E.*, 85 I.C. 643: 1925 A. 227: 26 Cr. L.J. 547; see also *Nga Te v. E.*, 20 I.C. 990.

24. *Saudagar Singh v. E.*, 1944 L. 377: 46 P.L.R. 135.

25. *Nga Ba Min v. E.*, 1935 R. 418.

home to the accused would not make the statement inadmissible for the purposes of the other offences which were committed in the course of the same transaction and with which the accused were charged.²⁶

In *Ali Jan v. The State*, a complaint in writing, made to the police by a person who died some time thereafter, expressing apprehension of death at the hands of a certain person was held admissible under section 32 (1) and section 8 of the Act, when the person whose conduct was the source of the apprehension was charged with the offence of murder of the person making the complaint. His statement was held admissible as relating to the circumstances of the transaction which resulted in his death within section 32 (1). The fact that the deceased had made a complaint to the police against the accused charging him with serious offences could also be admitted as showing a motive under section 8.²⁷

In *Krishna Ram v. State*, the deceased as soon as he was carried to the verandah of his house, on being questioned by his son as to how he sustained the injuries, stated that it was the appellant who had inflicted the injuries on his person. This statement obviously related to the circumstances of the transaction which ultimately resulted in his death. The doctor deposed that the injury was the contributing factor in the death. The statement made by the deceased, very shortly after he sustained the injuries, was held admissible.²⁸

Death not as a result of injuries.—When the deceased is not proved to have died as a result of injuries received by him in the incident where he is alleged to have been killed, his statement relating to that incident cannot be said to be as to the cause or the circumstances of the transaction which resulted in his death.²⁹

Statement not as to the cause of death is not admissible. When dying declaration inadmissible.—Clause (1) of section 32 of the Evidence Act makes a statement of a person who has died relevant only when that statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. When Gaya Charan is not proved to have died as a result of the injuries received in the incident, his statement cannot be said to be the statement as to the cause of his death or as any of the circumstances of the transaction which resulted in his death.³⁰

Circumstances of transaction resulting in his death.—This expression is not as wide in its import as circumstantial evidence and is narrower than *res gestae*. In *Pakala Narayan's* case the Privy Council has set out the limits of the matter that could be brought within the ambit of this expression.

'The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The

26. *Parmanand v. E.*, 1940 N. 340: I. L.R. 1941 N. 110: 42 Cr. L.J. 17: 190 I.C. 849.

27. 1960 Cr. L.J. 894 (Bom.).

28. A.I.R. 1964 Assam 53.

29. *Moti Singh v. S.A.*, 1964 S.C. 900.

30. *Moti Singh v. The State of Uttar Pradesh*, (1964) 1 S.C.R. 688: 1963 Cur. L.J. 87: 1963 (2) S.C.J. 714.

circumstances must be circumstances of the transaction; general expression indicating fear or suspicion, whether of a particular individual or otherwise will not directly relate to the occasion of the death, will not be admissible. But statements made by the deceased that he was proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him, would each of them be circumstances of the transaction, and would be so whether the person unknown was or was not the person accused. Such a statement might indeed be exculpatory of the person accused. "Circumstances of the transaction" is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in 'circumstantial evidence' which includes evidence of all relevant facts. It is on the other hand narrower than *res gestae*. Circumstances must have some proximate relation to the actual occurrence, though, as for instance, in a case of prolonged poisoning they may be related to dates at a considerable distance from the date of actual fatal dose. It will be observed that 'the circumstances' are of the transaction, which resulted in the death of the declarant. It is not necessary that there should be a known transaction other than that the death of the declarant has ultimately been caused, for the condition of the admissibility of the evidence is that 'the cause of (the declarant's) death comes into question'. In the present case, the cause of the declarant's death comes into question. The transaction is one in which the deceased was murdered on one of two successive days next following his statement in question and his body was found in a trunk proved to have been bought on behalf of the accused: the statement made by the deceased that he was setting out to the place where the accused lived and to meet a person, the wife of the accused, who lived in the accused's house, appears clearly to be a statement as to some of the circumstances of the transaction which resulted in his death. The statement was rightly admitted".³¹

Person to whom the declaration should be made; form of the declaration.—It is immaterial to whom the declaration is made. The declaration may be made to a Magistrate, to a Police Officer,³² a public servant or a private person. The declaration may be in writing or oral, or made by signs and gestures in answer to questions where the declarant is unable to speak;³³ but, in the latter case, the interpretation of the signs and gesture is for the Court alone, and the opinion of witnesses as to their meaning is inadmissible.³⁴ The declaration may take the form of a first information report;³⁵ or a statement before the police, section 162 of the Criminal Procedure Code not declaring it inadmissible by reason of its

31. 66 I.A. 66.

32. Rahman v. E., 134 I.C. 117; 1932 L. 14: 32 Cr. L.J. 1118.

33. Alexander Perera Chandarasekera v. The King, 1937 P.C. 24: 166 I.C. 330; E. v. Motiram Raising, 1936 B. 372: 165 I.C. 422: 37 Cr. L.J. 1140; Q.E. v. Abdullah, 7 A. 385 (F.B.); E. v. Sadhu Charan Das, 49 C. 600: 77 I.C. 993: 1922 C. 409: 25 Cr. L.J. 529; Ranga v. E., 5 L. 305: 84 I.C. 552: 1924 L. 581: 26 Cr. L.J. 328; Sudama Sheoba v. K.E., 1949 N. 405: I.L.R. 1949 N. 301: 1949 N.L.J. 354: 51 Cr. L.J. 224.

34. Darpan Potdarin v. E., 1938 P. 153; Chandrika Ram Kahar v. E.

1 P. 401: 71 I.C. 353: 1922 P. 535: 24 Cr. L.J. 129; Sudama Sheoba v. K.E., 1940 N. 405: I.L.R. 1949 N. 301: 1949 N.L.J. 354: 51 Cr. L.J. 224.

35. E. v. Mohammad Sheik, 1943 C. 74; Kapur Singh v. E., 123 I.C. 120: 1930 L. 450: 31 Cr. L.J. 475; Banta Singh v. E., 122 I.C. 491: 1930 L. 457; Chunilal v. E., 88 I.C. 353: 1924 N. 115: 26 Cr. L.J. 1121; Panchu Das v. E., 34 C. 698; see also Azimaddy v. E., 54 C. 237: 99 I.C. 227: 1927 C. 17: 28 Cr. L.J. 99; Lalaram Surajmal v. State, 1953 M.B. 249. 1954 Cr. L.J. 1764; Zafar v. Crown, P.L.D. 1951 Dacca 95.

having been made in the course of investigation by the police;³⁶ or a complaint;³⁷ or a statement under section 164, Criminal Procedure Code;³⁸ or a deposition before the committing Magistrate, in which case it may also become admissible under the next section.³⁹ Where a statement takes the form of a deposition but is inadmissible as such owing to some irregularity, it may still be relevant as a dying declaration.⁴⁰ The declaration may take the form of a simple narrative, or that of questions and answers; in the latter case, it is no objection to its admissibility that the questions were in the leading form,⁴¹ though it may be an argument against its value. If, however, a declaration is made in answer to questions, the record should clearly set out the exact questions put and the answers made to them,⁴² so that it may be possible to discover how much was suggested by the interrogator and how much was the production of the person making the statement.⁴³ Where, however, the recording Magistrate knows nothing of what has taken place and in recording the statement puts some questions which he does not specially mention, the value of the declaration is not affected as the Magistrate cannot in such a case put any leading questions.⁴⁴ The declaration "should be taken down in the exact words which the person who makes it uses, in order that it may be possible from those words to arrive at precisely what the person making the declaration meant. When a statement is not the *ipsissima verba* of the person making it, but is composed of a mixture of questions and answers, there are several objections open to its reception in evidence, which it is desirable should not be open in cases in which the person has no opportunity of cross-examination. In the first place, the questions may be leading questions, and, in the condition of a person making a dying declaration, there is always very great danger of leading questions being answered without their force and effect being fully comprehended."⁴⁵ It is not necessary that the record of the declaration should be read over to, or signed by, the dying man; though the fact that it was so read over or signed would add to the value of the declaration.⁴⁶ A declaration, which is not taken in the deceased's own words but is merely a note of the substance of what she said to the police, cannot safely be accepted as a sufficient basis for conviction.⁴⁷

Statements made by deceased to Magistrate and Police Head Constable—Admissibility of.—Where there is no evidence to show that the

- | | |
|--|--|
| 36. E. v. Mahadeo Dewoo, 47 Bom. L.R. 992. | Cr. L.J. 1256; K.E. v. Mathura Thakur, 6 C.W.N. 72. |
| 37. Gouridas Namasudra v. E., 36 C. 659; 2 I.C. 341; 10 Cr. L.J. 186. | 43. Rambira Missir v. E., 1943 P. 397; E. v. Premananda Dutt, 52 C. 987; 88 I.C. 1000; 1925 C. 876; 26 Cr. L.J. 1256. |
| 38. Rahman v. E., 134 I.C. 117; 1932 L. 14; 32 Cr. L.J. 1118; Chandgi v. E., 120 I.C. 274; 1930 L. 60; 31 Cr. L.J. 79. | 44. Rambira Missir v. E., 1943 p. 397. |
| 39. E. v. Rochia Mehato, 7 C. 42. | 45. Per Cave, J., in R. v. Mitchell, (1892) 17 Cox C.C. 503; E. v. Premananda Dutt, 52 C. 987; 88 I.C. 1000; 1925 C. 876; 26 Cr. L.J. 1256; see also Nga Mya Da v. E., 1936 R. 42. |
| 40. Parmanand Ganga Prasad v. E., 1940 N. 340; Rahman v. E., 134 I.C. 117; 1932 L. 14; 32 Cr. L.J. 1118; Chandgi v. E., 120 I.C. 274; 1930 L. 60; 31 Cr. L.J. 79; R. v. Woodcock, (1789) 1 Leach, 500. | 46. Krishnama Naicken v. E., 54 M. 678; 135 I.C. 337; 1931 M. 430; 33 Cr. L.J. 115; see also Nga Mya Da v. E., 1936 R. 42; Jangir Singh v. State, 1951 Pepsu 111; 52 Cr. L.J. 883. |
| 41. R. v. Smith, 10 Cox 82; but see Nga Mya Da v. E., 1936 R. 42; 160 I.C. 597; 37 Cr. L.J. 299. | 47. E. v. Sikandar, 125 I.C. 585; 1930 A. 532; 31 Cr. L.J. 862. |
| 42. Rambira Missir v. E., 1943 P. 397; E. v. Premananda Dutt, 52 C. 987; 88 I.C. 1000; 1925 C. 876; 26 | |

injuries sustained by the deceased due to the acid burns were in any way connected with his death which occurred nearly 2 months and 23 days later after the incident, the Court is justified in holding the statements made by the deceased, one to the Magistrate and other to the head constable, immediately after the incident, are not admissible in evidence under section 32 of the Evidence Act.⁴⁸

Declaration recorded by a Magistrate not competent to do so.—A statement under section 164, Cr. P. Code, can be recorded only by a Magistrate of the first class or by a Magistrate of the second class specially empowered.⁴⁹ But where a statement recorded by a Magistrate under section 164 or otherwise becomes relevant as a dying declaration, the statement is admissible even though the Magistrate who recorded it was not competent to record statements under section 164, Cr. P. Code.⁵⁰ A dying declaration may be recorded by a clerk in the presence and supervision of the Magistrate. It is no doubt highly undesirable that the writing of the dying declaration should be entrusted to a clerk when the Magistrate before whom it is made is not incapable of doing it himself.¹

Mode of recording a dying declaration.—The recording of a dying declaration is a grave and solemn proceeding. Unauthorized persons should not be permitted to crowd round when the declaration is being made. It is the bounden duty of the Magistrate to take every possible step to ensure that no influence is brought to bear on the declarant and that he is not prompted or aided in any way in making his statement. The proceeding should be so conducted that the declarant is as free from personal influence in emitting his declaration as he would be if he were giving evidence in a Court of law.²

Dying declaration comprising of answers to questions probative value.—A dying declaration cannot be relied upon when it does not record what deceased himself wanted to say, but records what he says on the suggestions of other persons.³

A dying declaration is admissible only when it is proved to be genuine and not the result of prompting. Ordinarily, it should be recorded in question and answer form and in the language in which it was spoken. But when it is proved by independent witnesses, its authenticity cannot be questioned merely because it is recorded in the narration form or in the local language.⁴

How should dying declarations be proved?—A dying declaration may be oral, or it may be reduced to writing by a Magistrate or any other person, but in either case it must be duly proved. The method of proving the record of such a declaration is to examine the person who recorded

48. *Katasani Rama Lakshamma v. Katasani Jagadeswara Reddi*, (1971) M.L.J. (Cr.) 392.

49. Section 164, Cr. P. Code.

50. *Sulaiman v. E.*, 1941 R. 301; *Rahman v. E.*, 134 I.C. 117; 1932 L. 14; 32 Cr. L.J. 1118; *Chandgi v. E.*, 120 I.C. 274; 1930 L. 60; 31 Cr. L.J. 79; *Cr. As.* 319-321; *Nur Mohd., etc. v. Crown*, (Lahore) decided on 6-6-39; *Allah Baksh v. Crown*, P.L.D. 1951 F.

C. 111.

1. *Jangir Singh v. State*, 1951 Pepsu 111: 52 Cr. L.J. 883.

2. *Nemi Singh v. E.*, 152 I.C. 741: 1934 A. 908: 36 Cr. L.J. 152.

3. *Keshav Gangaram Navge v. State of Maharashtra*, (1971) 1 S.C.C. 513.

4. *Bakhshish Singh v. State of Punjab*, 1958 S.C.R. 409: 1957 Cr. L.J. 1459.

the statement as to what the deceased said, or to examine some person or persons who were present at the time and heard the statement being made.⁵ When the Magistrate before whom a dying declaration is recorded deposes about its authenticity it should not be rejected merely because the clerk who had recorded it is not produced to prove it.⁶ If the statement was written or dictated by the deceased himself, the fact that it was written or dictated by the deceased must be proved.⁷ If the statement was written by the deceased person himself it becomes substantive evidence.⁸ Where the statement has not been proved in this manner, it will be inadmissible,⁹ even though it may have been recorded by a Magistrate,¹⁰ as section 80 of the Evidence Act does not raise any presumption that the statement was made by a particular person.¹¹ When the person who recorded the statement is called, he may either repeat what the deceased stated, refreshing his memory, under section 159, by the record,¹² or he may merely depose that the record correctly represents what the deceased stated.¹³ The record must be produced and properly proved.¹⁴ A statement purporting to be a dying declaration should be admitted or rejected as a whole; it is irregular to admit in evidence only portions of the statement. The statement of a witness, made before the committing Magistrate in proof of a dying declaration, may, in appropriate cases, be transferred to the Sessions record under section 33 of the Evidence Act.¹⁵ If the dying declaration consists of a verbal statement, the persons who heard the deceased make it must be examined as witnesses.¹⁶

There is authority for the proposition that if the statement of the deceased was taken as a deposition in the presence of the accused by a

5. *Parmanand Ganga Prasad v. E.*, 1940 N. 340; *Nga Mya Da v. E.*, 1936 R. 42: 160 I.C. 597; *E. v. Somra Bhuian*, 16 P. 593: 1937 P. W.N. 897; *Krishnama Naicken v. E.*, 54 M. 678: 135 I.C. 337: 931 M. 430: 33 Cr. L.J. 115; *Tafiz Pramanik v. E.*, 125 I.C. 743: 1930 C. 228: 31 Cr. L.J. 916; *E. v. Balram Das*, 49 C. 358: 71 I.C. 685: 1922 C. 382: (2): 24 Cr. L.J. 221; *Kunj Lal v. E.*, 67 I.C. 577: 1924 L. 12: 23 Cr. L.J. 417; *In re Karuppan Samban*, 31 I.C. 359: 16 Cr. L.J. 759; *Public Prosecutor v. Bala Nagi Reddi*, 15 I.C. 308: 13 Cr. L.J. 468; *Gouridas Namasudra v. E.*, 36 C. 659: 2 I.C. 841: 10 Cr. L.J. 186; *K.E. v. Mathura Thakur*, 6 C.W.N. 72; *K.E. v. Daulat Kunjra*, 8 C.W.N. 921; *E. v. Samiruddin*, 8 C. 211; *Nathu Ram v. State*, 1951 H.P. 1: 52 Cr. L.J. 50.
6. *Jangir Singh v. State*, 1951 Pepsu 111: 52 Cr. L.J. 883.
7. *Nga Mya Da v. E.*, 1936 R. 42: 160 I.C. 597: 37 Cr. L.J. 299.
8. *Ibid.*
9. *K.E. v. Daulat Kunjra*, 6 C.W.N. 921.
10. *E. v. Samiruddin*, 8 C. 211; *Reg. v. Fata Adaji*, 11 Bom. H.C. 247; *Panchu Das v. E.*, 34 C. 698; *Gouridas Namasudra v. E.*, 36 C. 659: 2 I.C. 841: 10 Cr. L.J. 186; *Sarat Chandra Kar v. E.*, 52 C. 446: 88 I.C. 860: 1925 C. 821: 26 Cr. L.J. 1244.
11. *Sulaiman v. E.*, 1941 R. 301: see also *Hashim v. E.*, 9 P.R. 1900 Cr.
12. *Nga Mya Da v. E.*, 1936 R. 42: 160 I.C. 597; *Kunj Lal v. E.*, 67 I.C. 577: 1924 L. 12: 23 Cr. L.J. 417; *K.E. v. Mathura Thakur*, 6 C.W.N. 72.
13. *Sulaiman v. E.*, 1941 R. 301; *Krishnama Naicken v. E.*, 54 M. 678: 135 I.C. 337: 1931 M. 430: 33 Cr. L.J. 115; *Kapur Singh v. E.*, 123 I.C. 120: 1930 L. 450: 31 Cr. L.J. 475; *Partap Singh v. E.*, 7 L. 91: 92 I.C. 167: 1926 L. 310: 27 Cr. L.J. 215; *E. v. Balaram Das*, 49 C. 358: 71 I.C. 685: 1922 C. 382: (2): 24 Cr. L.J. 221; section 160; but see *Kunj Lal v. E.*, 67 I.C. 577: 1924 L. 12: 23 Cr. L.J. 417; *Public Prosecutor v. Bala Nagi Reddi*, 15 I.C. 308: 18 Cr. L.J. 468; *K.E. v. Mathura Thakur*, 6 C.W.N. 72.
14. *Rahim Gul Hanif Gul v. E.*, 1938 Pesh. 33.
15. *Tafiz Pramanik v. E.*, 125 I.C. 743: 1930 C. 228: 31 Cr. L.J. 916.
16. *Nga Mya Da v. E.*, 1936 R. 42: 160 I.C. 597: 37 Cr. L.J. 299.

Magistrate exercising judicial jurisdiction, e.g., by a Magistrate who had taken cognizance of the offence as a committing or inquiring Magistrate, the statement, subject to the provisions of section 33, is admissible without further proof, i.e., without the recording Magistrate being examined in the Sessions Court;¹⁷ and in some recent decisions it has further been held that a dying declaration properly recorded by a Magistrate under section 164 Cr. P. Code, is "evidence" within the meaning of section 3 of the Act and can be admitted in evidence under section 80 of the Act without further proof.¹⁸ It has, however, been held in one of these cases that proof of the identity of the declarant would in such a case be necessary¹⁹ and in another that the presumption of section 80 only applies where the injured man has survived and the record of the statement is used, not as a dying declaration, but merely to corroborate or contradict the evidence given by him.²⁰ If a certificate appended to a dying declaration recorded as a deposition states that the statement was read over to the deponent, there will be a presumption under section 80 that the recital as to the statement having been read over is correct.²¹ Where the declarant has been very badly injured, the medical evidence should be carefully examined to see if he could be in a fit state to make a declaration.²²

Test of reliable dying declaration.—In the case of *Khushal Rao v. Bombay*, the Supreme Court held:

- (1) That it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated;
- (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made;
- (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence;
- (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence;
- (5) that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character; and

17. *E. v. Samiruddin*, 8 C. 211; see *Panchu Das v. E.*, 34 C. 698; *Reg. v. Fata Adaji*, 11 Bom. H.C. 247. *Woodroffe. Ev.*, 8th Ed., 318, 319; *Field. Ev.*, 8th Ed., 169 contra *Ghazi v. E.*, 17 P.R. 1911 Cr.

18. *E. v. Surajbali*, 56 A. 750; 1934 A. 340; 152 I.C. 249; 36 Cr. L.J. 65; *Sulaiman v. E.*, 1941 R. 301; see also *Bishandhari Gope v. E.*, 1941 P.W.N. 622; contra *Ghazi v. E.*, 17 P.R. 1911 Cr.; *Hashim v. E.*,

9 P.R. 1900 Cr.; see also *Purshotam Ishwar Amin v. E.*, 45 B. 834; 60 I.C. 593.

19. *Sulaiman v. E.*, 1941 R. 301.

20. *Bishandhari Gope v. E.*, 1941 P. W.N. 622.

21. *In re Karuppan Samban*, 31 I.C. 359; 16 Cr. L.J. 759.

22. *Anant Ram Maya Ram v. E.*, 1938 L. 262; *Dharam Singh v. E.*, 1938 L. 268; *Sulaiman v. E.*, 1941 R. 301.

- (6) that in order to test the reliability of a dying declaration, the Court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.²³

Witnesses present at the time of recording of dying declaration not examined.—The statement of the deceased who died after a week, made to the clerk constable cannot be admitted in evidence under section 32 of the Evidence Act, as the deceased chanced to live for one week and as such it ceases to be a dying declaration. Assuming that the statement was a dying declaration admissible under section 32, it is wholly insufficient for upholding the conviction as it is not recorded in the words of the deceased and the witnesses present when the deceased made the statement were not examined.²⁴

Circumstances which lend strength and assurance to a dying declaration.—

1. That it was recorded by a competent Magistrate after taking all proper precautions;
2. That it was taken down in the exact words in which it was spoken, and that wherever questions were put, the exact questions and the answers given to them had been carefully recorded;
3. That this was made shortly after the incident of assault when there was no opportunity of its being coloured by impressions received from others;
4. that the deceased had ample opportunity of observation;
5. that the incident happened in broad day light, or if at night time, in a place which was sufficiently lighted;
6. that the deceased had made more than one statement, and all of them were consistent as to the circumstances of the occurrence and the identity of the attackers.²⁵

Evidential value of dying declarations; need for corroboration.—
 “The human mind is so constituted as to be inclined to attach a very high degree of importance to dying declarations; and it is necessary that the Judge who has to decide should have present to his mind the arguments against their weight as well as in their favour.”²⁶ “The tongues of dying men enforce attention like deep harmony; where words are scarce, they are seldom spent in vain; for they breathe the truth that breathe their

23. Khushal Rao v. State of Bombay, 1958 S.C.R. 552; 1958 S.C.J. 198; 1958 Cr. L.J. 106.

24. Jaswant v. State, 1971 A.W.R. 365.

25. Khushal Rao v. State of Bombay, 1958 S.C.R. 559; 1958 Cr. L.J. 106.

26. Nort, 176-177.

words in pain".²⁷ But "though declarations, deliberately made under a solemn sense of impending death and concerning circumstances wherein the deceased is not likely to be mistaken, are entitled to great weight, it should always be recollected that the accused has not the power of cross-examination—a power as effectual in eliciting the truth as is the obligation of an oath;—and that when a witness has not a deep sense of accountability to his Maker, feelings of anger or revenge, or, in the case of mutual conflict, the natural desire of screening his own misconduct, may affect the accuracy of his statements, and give a false colouring to the whole transaction. Moreover, the particulars of the violence to which the deceased has spoken are likely to have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed, and leading both to mistakes as to the identity of persons, and to the omission of facts essentially important to the completeness and truth of the narrative".²⁸ In India, a dying declaration assumes a character very widely different from what it has under the English Law, and is relevant whether the person who made it was or was not at the time he made it under expectation of death; the weight to be attached to it depends, not upon the expectation of death which is a guarantee of its truth, but upon the circumstances and surroundings under which it was made, and very much also upon the nature of the record that has been made of it. It is almost a question of fact whether it should be relied upon or not, and, therefore, a matter entirely within the province of the jury.²⁹ In the Punjab, a person mortally wounded frequently makes a statement bringing all his hereditary enemies on to the scene at the time of his receiving the wound, thus using his last opportunity to do them an injury.³⁰ A dying declaration is not made on oath and is not subject to cross-examination, the maker of it might be mentally and physically in a state of confusion and might well be drawing upon his imagination while he was making the declaration.³¹ It is, therefore, unsafe to convict on an uncorroborated dying declaration,³² particularly in the Punjab. A dying declaration is a relevant fact under section 32 of the Act. This itself means that it can be used for proving the fact in issue. There is no provision in the Evidence Act lending support to the proposition that a conviction cannot be based on an uncorroborated dying declaration. If the dying declaration is not believed, it is a different matter. But once it is believed, it

27. Anonymous quotation in *In re Arumuga Thevan*, 129 I.C. 252: 1931 M. 180: 32 Cr. L.J. 357; *Shah Baz v. Crown*, P.L.D. 1953 L. 566.

28. Taylor, § 722. But see *State v. Kanchan Singh*, 1954 A. 153: 1954 Cr. L.J. 264: 1953 A.L.J. 615.

29. *Inayat Khan v. E.*, 16 L. 589: 1935 L. 94: 158 I.C. 336: 36 Cr. L.J. 1335; *Naimuddin Biswas v. E.*, 1936 C. 93: *E. v. Premanand Dutt*, 52 C. 987: 88 I.C. 1000: 1925 C. 876: 26 Cr. L.J. 1256; see also *E. v. Akbarali Karimbhai*, 58 B. 31: 146 I.C. 548: 1933 B. 479 (2): 35 Cr. L.J. 109; *State v. Kanchan Singh*, 1954 A. 153: 1954 Cr. L.J. 264: 1953 A.L.J. 615.

30. Stephen's *History of the Criminal Law in England*, Vol. 1, p. 448;

Khursaid Hussain v. E., 1941 L. 368; *Ghulam Qadir v. Crown*, 1929 P.L.R. 536; *Autar Singh v. E.*, 4 L. 451: 81 I.C. 964: 1924 L. 253: 25 Cr. L.J. 1140; but see *Mian Khan v. Crown*, P.L.D. 1954 L. 646.

31. *Ram Nath Madho Prasad v. State*, 1953 S.C. 420: 1953 Cr. L.J. 1772:

32. *Ram Nath Madho Prasad v. State*, 1953 S.C. 420: 1953 Cr. L.J. 1772; *Bhikhari v. E.*, 150 I.C. 819: 1934 O. 405: 35 Cr. L.J. 1113; *Rullu Singh v. E.*, 120 I.C. 474: 1929 P. 249: 31 Cr. L.J. 136.

33. *Bakhshish Singh v. E.*, 86 I.C. 826: 1925 L. 549: 26 Cr. L.J. 890; but see *Shah Baz v. Crown*, P.L.D. 1953 L. 566.

leads to the conclusion of the guilt of the accused.³⁴ Corroboration of a dying declaration is not necessary as a rule of law, but where a dying declaration is not made in expectation of death and is not made in the presence of the accused, prudence requires that it should be corroborated before it is acted upon.³⁵ A dying declaration is not entitled to any peculiar credit. If a man gasps out his story soon after the transaction which subsequently results in his death, it may be said that there was no time for him to fabricate, or for his friends to suggest falsehood. But if a statement is made several days after the transaction and many days before his death, that statement does not carry much weight and it is incumbent on the Court before it accepts the statement to see how far it is corroborated.³⁶ Field says that in more than one instance he has known a statement, made by a person who did not expect to live many hours, turn out to be wholly and utterly untrue.³⁷ Where the deceased, while making a statement, is prompted by a bystander, an interested party or a Police Officer,³⁸ or is kept back from hospital to be instructed as to what he has to say,³⁹ or where a dying declaration is made at a time when the deceased was well aware that the accused was named as the assailant,⁴⁰ the declaration should not be assigned much weight. Of course no value can be attached to a dying declaration when the relatives of the declarant arrange with him as to what he has to say.⁴¹ But where a declaration is made by the deceased in full possession of his faculties, and is proved by reliable evidence in the exact words of the deceased, it is a very valuable piece of evidence⁴² and is sufficient to support a conviction of murder if it is corroborated by the surrounding circumstances.⁴³ Where, in view of the numerous and very severe injuries received by the deceased on his head, the Court has grave doubts as to his being in a condition to utter even a single word after the injuries had been inflicted on him, the Court should discard the evidence of the dying declaration of the deceased given by the prosecution witnesses.⁴⁴ When the maker of a dying declaration is proved to have become unconscious at the spot and died a few minutes after the making of the declaration, it would not be safe to act upon such a dying declaration.⁴⁵ Where a dying declaration is supported by the consistent evidence produced by the prosecution, considerable weight should be attached to it.⁴⁶ A difference between a dying declaration and the first information report renders it necessary to examine both pieces of evidence with extra care, but such difference alone does not necessarily render a dying declaration wholly unworthy of credence.⁴⁷ If a dying

34. State v. Kanchan Singh, 1954 A. 153: 1954 Cr. L.J. 264: 1953 A.L.J. 615; Kunwarpal Singh v. E., 1948 A. 170: 1947 A.L.J. 627: 49 Cr. L.J. 1400: I.L.R. 1948 A. 122; Sudama Sheoba v. K.E., 1949 N. 405: I.L.R. 1949 N. 301: 1949 N. L.J. 354: 51 Cr. L.J. 224.

35. E. v. Akbarali Karimbhai, 58 B. 31: 146 I.C. 548: 1933 B. 479 (2): 35 Cr. L.J. 109; see also Mohammad Arif v. E., 1941 P. 409.

36. In re Arumuga Thevan, 129 I.C. 252: 1931 M. 180: 32 Cr. L.J. 357.

37. Field, Ev., 8th Ed., 172.

38. Dial Singh v. E., 153 I.C. 810: 1934 L. 805: 36 Cr. L.J. 427; Bishen Singh v. E., 96 I.C. 215: 1926 L. 496: 27 Cr. L.J. 903.

39. Pichumma Naidu v. E., 1980 M.W. N. 1211: see also Mohammad Arif v. E., 1941 P. 409.

40. Muzaffar v. E., 99 I.C. 322: 28 Cr. L.J. 114.

41. Varand v. E., 1944 S. 137.

42. Dial Singh v. E., 153 I.C. 810: 1934 L. 805: 36 Cr. L.J. 427.

43. Karim Khan v. E., 1 I.C. 100: 9 Cr. L.J. 156.

44. Ratan Lal v. E., 8 Luck. 570: 146 I.C. 381: 1933 O. 333: 35 Cr. L.J. 45.

45. Gurdial Singh v. Crown, 1949 E. P. 228: 51 P.L.R. 74: 50 Cr. L.J. 568.

46. Sawan Singh v. E., 10 L.L.J. 281:

47. Mula Singh v. E., 71 I.C. 593: 1924 L. 413: 24 Cr. L.J. 177.

declaration contradicts itself in its various parts, its evidentiary value is negligible.⁴⁸ For an accused person to be convicted on a dying declaration alone the Court must be quite satisfied that the dying declaration bears all the marks of truth. The statement must be examined with care, remembering that it is an *ex parte* statement, made as a rule in the absence of the accused without the accused having any chance of cross-examining the person who made it. But where the Court is satisfied that the man who made the dying declaration had a good opportunity of recognizing the person who attacked him: that he did recognize him and that he was telling the truth when he made his dying declaration, a conviction can be solely based on such a declaration.⁴⁹ There are many cases in which it is quite safe to convict on a dying deposition, but these are cases in which there is absolutely no doubt that the deceased had a good opportunity of knowing who the assailant was and could not have been mistaken, and at the same time there is no possible reason why he should be falsely accusing the alleged assailant; but where the recognition, though possible, was difficult under the circumstances, it is not quite safe to convict merely on a dying deposition.⁵⁰ A dying declaration which names only one person, and where the killing took place under circumstances where there could be no doubt that the dying man identified his assailant; is the very strongest possible form of evidence. But where a large number of people are implicated it is a very different matter and in the absence of corroboration of the dying declaration, the accused should not be convicted.¹ Where from the dying declaration made by a person who is alleged to have been murdered it appears that there was clearly a conspiracy wrongly to implicate a particular person, the High Court, before it would rely on the evidence of witnesses who have so conspired and who have had such an influence over the deceased making a dying declaration that they could have induced him to make a particular dying declaration to suit their purpose, must have some other evidence before it which would enable it to distinguish the true from the false.²

The fact that the declaration was read over to and signed by the dying man adds to the evidentiary value of the declaration.³

Unless one is certain about the exact words uttered by the deceased, no reliance should be placed on verbal statements of witnesses and the oral declaration made by a deceased.⁴ Oral dying declaration should be consistent, and there should not be a serious discrepancy relating to the evidence.⁵

Need for corroboration to a dying declaration.—It is settled law that it is not safe to convict an accused person merely on the evidence furnished by a dying declaration without further corroboration because such a

48. *Inayat Ali v. E.*, 118 I.C. 526: 29 Cr. L.J. 418.

49. *The King v. Maung Po Thi*, 1938 R. 282; see also *In re Guruswami Tevar*, 1940 M. 196 (F.B.); *Mohammad Arif v. E.*, 1941 P. 409; *Ranoo Mir Bhand v. E.*, 1942 Kar. 587; *Gulab Rao Krishnaje v. E.*, 1945 N. 153; *Lumba v. State*, 1952 Raj. 155: 1952 Cr. L.J. 1248.

50. *Nga Po Si v. E.*, 1936 R. 324: 164 I.C. 139: 37 Cr. L.J. 990; *Moham-*

mad Arif v. E., 1941 P. 409.

1. *Khurshid Hussain v. E.*, 1941 L. 368.

2. *Dengo Kadero v. E.*, 1938 S. 94.

3. *Krishnama Naicken v. E.*, 54 M. 678: 135 I.C. 337: 1931 M. 430: 33 Cr. L.J. 115; *Nga Mya Da v. E.*, 1936 R. 42: 160 I.C. 597: 37 Cr. L.J. 299.

4. *Ram Nath Madho Prasad*, 1953 S. C. 420: 1953 Cr. L.J. 1772.

5. *Thakur v. State*, 1955 A. 189.

statement is not made on oath and is not subject to cross-examination and because the maker of it might be mentally and physically in a state of confusion and might well be drawing upon his imagination while he was making the declaration. It is in this light that the different dying declarations made by the deceased and sought to be proved in the case have to be considered. Unless one is certain about the exact words uttered by a deceased, no reliance can be placed on verbal statements of witnesses and on such oral declaration made by the deceased.⁶

Infirmity in dying declaration—corroboration required.—The necessity for corroboration arises not from any inherent weakness of dying declaration as a piece of evidence but from the fact that the Court, in a given case, had come to the conclusion, that that particular dying declaration was not free from infirmities, or from such other infirmities as may be disclosed in evidence in that case.⁷

Where the deceased has been accompanied from the place of occurrence to the hospital by eye-witnesses to the incident and in the dying declaration, made under solemn sense of impending death, the name of one of the eye-witnesses is not mentioned and two of the accused mentioned therein are acquitted on benefit of doubt and the occurrence had taken place in day light and the eye-witness account strengthens the reliability of that dying declaration, such a declaration is good evidence and is not untrue.⁸

Absconding as corroboration.—Police alleged that the accused was absconding and this was sufficient corroboration of the dying declaration of the deceased. Really the accused had not left the jurisdiction of the local police. Held that, in these circumstances, absconding was not sufficient corroboration of the dying declaration.⁹

No rule of law or prudence that it requires corroboration.—It is neither a rule of law nor of prudence that a dying declaration requires to be corroborated by other evidence before a conviction can be based thereon. The evidence furnished by the dying declaration must be considered by the Judge, just as the evidence of any witness, though undoubtedly some special considerations arise in the assessment of dying declaration which do not arise in the case of assessing the value of a statement made in court by a person claiming to be a witness of the occurrence. In the first place, the Court has to make sure as to what the statement of the dead man actually was. This itself is often a difficult task, specially where the statement had not been put into writing. In the second place, the court has to be certain about the identity of the persons named in the dying declarations a difficulty which does not arise where a person gives his depositions in Court and identifies the person who is present in court as the person whom he has named.¹⁰

6. Ram Nath Madhoprasad v. State of Madhya Pradesh, 1953 Cr. L.J. 1772.

7. Khushal Rao v. State of Bombay, 1958 S.C.R. 552: 1958 Cr. L.J. 103: 1958 S.C.J. 198.

8. Meharchand v. State of Rajasthan, 1969 Raj. L.W. I.L.R. (1969) 19

Raj. 641.

9. Khushal Rao v. State of Bombay, 1958 S.C.R. 552: 1958 Cr. L.J. 106: 1958 S.C.J. 198.

10. Harbans Singh and another v. The State of Punjab, (1962) (1) Cr. L.J. 479.

Conviction may be based on uncorroborated dying declaration.—If a dying declaration has been made by a person whose antecedents were doubtful, that may be a ground for looking upon it with suspicion, but generally speaking, the maker of a dying declaration cannot be tarnished with the same brush as the maker of a confession or an approver.¹¹

When conviction can be based only on dying declaration.—A truthful and reliable dying declaration may form the sole basis of conviction, even though it is not corroborated. But the Court must be satisfied that the declaration is truthful. The reliability of the declaration should be subjected to a close scrutiny, considering that it was made in the absence of the accused who had no opportunity to test its veracity by cross-examination. If the Court finds that the declaration is not wholly reliable and a material and integral portion of the deceased's version of the entire occurrence is untrue, the Court may, in all the circumstances of the case, consider it unsafe to convict the accused on the basis of the declaration alone without further corroboration.¹²

Conviction of the offence of murder can be based solely on the dying declarations made by the deceased, when it is proved that they were made without any prompting or influence by any one, and there is no cogent reason given or suggested by the accused for throwing doubt on their truth or correctness.¹³

Dying declaration—Evidentiary value of.—Court satisfied that dying declaration is truthful version as to circumstances of death and identity of assailants.—No question of further corroboration arises: The contention was that the High Court was not justified in basing the conviction of the appellant on the dying declaration of the deceased after having rejected the evidence of the four eye-witnesses as unreliable. It was said that the dying declaration ought not to have been acted upon unless there was sufficient corroboration thereof. The Supreme Court held that it is not possible to accept this argument as well founded. Once the Court has come to the conclusion that the dying declaration is a truthful version as to the circumstances of the death and the identity of the assailants of the victim, there is no question of further corroboration.¹⁴

A dying declaration is not to be believed merely because no possible reason can be given for accusing the accused falsely. It can only be believed, if there are no grounds for doubting it at all.¹⁵

A dying declaration must stand or fall as a whole.—A dying declaration stands upon a widely different footing from the testimony of a witness given in Court. In the case of the latter, it is permissible and at times necessary under certain circumstances to accept a part which is unimpeachable, and reject that which is obviously untrue, though to found a conviction on such appraisal of evidence is very often very unsafe. As regards a dying declaration, to accept a portion and reject the rest is

11. *Khushal Rao v. State of Bombay*, 1958 S.C.R. 552: 1958 Cr. L.J. 106.

12. *Thakuranni Pampiah v. State of Mysore*, (1965) (2) S.C.J. 157: 1965 (2) Cr. L.J. 31.

13. *Tarachand Damu Sutar v. State of*

Maharashtra, 1962 (1) Cr. L.J. 196.

14. *Pandharinath Budho Patil v. State of Maharashtra*, (1969) (2) S.C. W.R. 591.

15. *Tara Chand v. The State*, (1962) (2) S.C.R. 775.

entirely out of the question; there must be absolute guarantee of the accuracy of the record and the truth of the entire statement before it can be acted upon¹⁶ In a Bombay case, however, it has been observed that the mere fact that a part of the dying declaration is shown to be false is not a sufficient reason for disregarding it as a whole.¹⁷ It is the statement actually made by the deceased which is relevant and not what he omits to state. No argument can be built upon what he has not said in his declaration.¹⁸ An omission to mention in the dying declaration a torch which was in the hands of the deceased and with which he caused injury on the body of the accused does not invalidate the dying declaration.¹⁹ A dying declaration mentioned A and B as amongst the assailants. The description of A given in the dying declaration was not sufficient, but description of B was sufficient to identify him. The use of the dying declaration against B was held as not amounting to use of a part of it. It was held to have been accepted wholly.²⁰ If a part of a dying declaration is proved to be false, the Court will not believe the other parts unless they are corroborated.²¹

Incomplete dying declaration.—An incomplete dying declaration is inadmissible. When the person making the dying declaration dies before the completion of his statement no one can tell what the deceased was about to add. It is a serious error to admit a dying declaration in part.²²

Dying declaration incomplete.—The deceased could not complete his statement, but the statement in regard to the accused having shot the deceased was complete in itself. Under the circumstances, the dying declaration, though incomplete otherwise, was complete so far as the accused having shot the deceased was concerned and could certainly be relied upon by the prosecution. There was corroboration of the dying declaration in the evidence of other witnesses. Such corroboration invested the dying declaration with a stamp of truth which went a long way towards inculcating the accused.²³

Dying declaration complete—thumb impression taken after death—statement admissible in evidence.—Corroboration would not always be necessary if the dying declaration is complete in its accusation and there is nothing to show that the maker of the statement had anything further to add. The fact that on account of sudden death the thumb impression of the person making the statement was taken after his death would not make the declaration inadmissible.²⁴

16. *E. v. Premananda Dutt*, 52 C. 987: 88 I.C. 1000: 1925 C. 876: 26 Cr. L.J. 1256.

17. *E. v. Akbarali Karimbhai*, 58 B. 31: 146 I.C. 548: 933 B. 479 (2): 35 Cr. L.J. 109; *Naimuddin Biswas v. E.*, 1936 C. 793: 40 C.W.N. 1377; but see *Pichumma Naidu v. E.*, 1930 M.W.N. 1211.

18. *Ram Bali v. State*, 1952 A. 289: 1952 Cr. L.J. 600.

19. *State v. Govinda Pillai Gopala Pillai*, 1952 T.C. 449: 1952 Cr. L. J. 1558.

20. *State v. Kanchan Singh*, 1954 A.

153: 1953 Cr. L.J. 264: 1953 A.L. J. 615.

21. *Naimuddin Biswas v. E.*, 1936 C. 793; *Provincial Govt. C.P. v. Jagan Bhat*, I.L.R. 1946 N. 235: 1946 N. 301: 47 Cr. L.J. 625; *Lalaram Surajmal v. State*, 1953 M.B. 249: 1954 Cr. L.J. 1764.

22. *Cyril Waugh v. The King*, 1950 A. C. 203: 54 C.W.N. 503.

23. *Abdul Sattar v. The State of Mysore*, 1956 Cr. L.J. 334.

24. *Muniappan v. State of Madras*, 1962 S.C.R. 869, (1962) (2) Cr. L.J. 404.

Dying declaration should be free and unaided by outside agency.—The dying declaration should be a statement made by the deceased unaided by any outside agency and without prompting by anybody. The declarant should be free from any outside influence in making his statement.²⁵

Limits of dying declaration.—The dying declaration is the statement made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death and such details which fall outside the ambit of this are not strictly within the permissible limits laid down by section 32(1), and unless absolutely necessary to make a statement coherent or complete should not be included in the statement. The authenticity of the dying declaration has to be judged in accordance with the circumstances of each case depending upon many factors which would vary with each case but those recording such statements would be well advised to keep in view the fact that the object of a dying declaration is to get from the person making the statement the cause of death or the circumstances of the transaction which resulted in death.²⁶

Long statement likely to be not genuine.—Long statements which are more in the nature of First Information Reports than recital of the cause of death or circumstances resulting in it are likely to give the impression of their being not genuine or not having been made unaided and without prompting.²⁷

Dying declaration need not be exhaustive.—Under the law a dying declaration need not be exhaustive, and need not disclose all the surrounding circumstances. It cannot be ruled out because of an omission to refer to a particular circumstance of the transaction, namely motive, nor can any argument be built upon what the declarant has not said in his declaration.²⁸

Dying declaration referring to motive of accused—admissibility.—Where the deceased refers in his dying declaration to threats given by accused to him then that part of the declaration is not admissible under section 32(1) of the Evidence Act which has to be strictly construed. The statement of the deceased, containing a reference to the motive of the accused, is not admissible, as it is not a statement made by him as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death within the ambit and scope of section 32(1) of the Evidence Act. It cannot take in acts which have no direct relation to death.²⁹

Dying declaration implicating several persons does not become less credible.—The law does not make any distinction between a dying declaration in which one person is named and a dying declaration in which several persons are named as culprits. A dying declaration implicating one person may well be false while a dying declaration implicating several

25. *Bakhshish Singh v. The State of Punjab*, 1958 S.C.R. 409: 1957 Cr. L.J. 1459.

26. *Bakhshish Singh v. The State of Punjab*, 1958 S.C.R. 409: 1957 Cr. L.J. 1459.

27. *Bakhshish Singh v. The State of*

Punjab, 1958 S.C.R. 409: 1957 Cr. L.J. 1459.

28. *State v. Jawan Singh*, 1971 Cr. L. J. 1656 (Raj.).

29. *Vinayak Datta v. State*, A.I.R. 1970 Goa. 96.

persons may be true. It is wrong to think that a dying declaration becomes less credible if a number of persons are named as culprits.³⁰

Value of dying declaration—Eye-witness was disbelieved and according to medical evidence the deceased was not in a position to walk or speak.—The medical evidence showed that the deceased was unable to speak. Ordinarily a dying declaration of this kind which the prosecution had relied upon was by itself insufficient for sustaining a conviction on a charge of murder.³¹

Dying declaration in Urdu.—A dying declaration recorded in Urdu is not illegal.³²

Application for police protection.—Deceased widow asking for police protection on account of apprehension of trouble from her brothers-in-law at the time of undertaking sowing operation—two months later deceased found murdered—her application for police protection held admissible under section 32 (1).³³

Sections 32 and 33.—A statement made by an eye-witness to a crime to other persons is not a dying declaration, and if that person dies before the case comes up in Court, such a statement is not admissible either under section 32 or 33.

The accused was charged with murder of a girl A at a lonely spot in a jungle where she and her sister B had gone to pick berries. The prosecution case was that when the mother of the two girls returned at noon to their hut, she inquired of B where A was, whereupon B made a statement disclosing the facts of the murder to her mother, and that sometime later she repeated that statement to others. After some months B died before she could give evidence in Court, and the question was whether evidence could be given by the mother and those witnesses as to what B had told them. The statement made by B was not admissible either under section 32 or section 33 of the Evidence Act. Section 33 could not apply because its scope is limited only to a previous statement made as a witness in a judicial proceeding. Section 32 also could not apply because it was confined to a statement made by a person as to the cause of his own death or as to the circumstances in which the death occurred, and the statement made by B related only to the circumstances in which her sister A's death occurred.³⁴

CLAUSE (2): DECLARATIONS IN COURSE OF BUSINESS OR DUTY

Reason of the rule.—The considerations which have induced the Courts to recognize this exception against the hearsay rule are principally these: that in the absence of all suspicion of sinister motives, a fair presumption arises that entries made in the ordinary course of business are correct, since, the process of invention implying trouble, it is easier to enter what is true than what is false; that such entries usually form a link in the chain of circumstances which mutually corroborate each other; that

30. Harbans Singh v. State of Punjab, 1962 (1) Cr. L.J. 479.

31. Bhagwan Das v. State of Rajasthan, 1957 Cr. L.J. 889; 1957 S.C.J. 515.

32. Bakhshish Singh v. State of Punjab,

1958 S.C.R. 409, 1957 Cr. L.J. 1459.

33. Dinkar Bandhu v. State, 72 Bom. L.R. 405.

34. Ratan Gond v. State of Bihar, 1959 Cr. L.J. 108; 1959 S.C.R. 1336.

false entries would be likely to bring the clerks into disgrace with their employers; that as most entries made in the course of business are subject to the inspection of several persons, an error would be exposed to speedy discovery; and that as the facts to which they relate are generally known but to few persons, a relaxation of the strict rules of evidence in favour of such entries may often prove convenient, if not necessary, for the due investigation of truth.³⁵ Illustrations (b), (c), (d), (g), (h) and (j) to this section and illustrations (b) and (c) to section 21 refer to this clause and the leading case in English Law on the subject is the case of *Price v. Torrington*.³⁶

Difference between the English rule and the Indian rule.—The rule, as enacted in this clause, differs from the corresponding rule of the English law according to which (i) the declaration must have been made contemporaneously with the fact recorded, i.e., at or near the time the fact recorded occurred;³⁷ (ii) the declarant must have had personal knowledge of the fact recorded;³⁸ (iii) the declaration must have been made in the discharge of duty to a third person, a mere personal custom, not involving responsibility, being insufficient;³⁹ and (iv) the declaration is evidence only of the precise fact that it was the writer's duty to record and not of other matters which, though contained in the same statement, are merely collateral.⁴⁰ But under the Act, though these considerations may affect the weight of this species of evidence, they do not affect its relevancy, the fact determining its relevancy being that the declaration was made in the ordinary course of business or in the discharge of professional duty.⁴¹

Condition precedent to the admissibility of the declaration: proof that the declarant cannot be called as a witness necessary.—In order to found a case for the reception of a statement under this clause, it must be proved that the declarant is dead or that he cannot be called as a witness for any of the reasons mentioned in the section, and the burden of proving this is on the person who wishes to give such statement in evidence.⁴² Death may, however, in appropriate cases, be presumed, e.g., where the record of the statement is an old one,⁴³ or where the declarant has not been heard of for 7 years.⁴⁴ The fact that the entries were made in the ordinary course

35. Taylor, § 697.

36. (1703) 2 Smith L.C., 11th Ed., 320.

37. Doe v. Turford, (1832) 3 B. & Ad. 890; The Henry Coxon, (1878) 3 P.D. 156.

38. Brain v. Preece, 11 M. & W. 773.

39. R. v. Worth, (1843) 4 Q.B. 132.

40. Chambers v. Bernasconi, (1831) 1 C.M. & R. 374; Smith v. Blakey, (1867) L.R. 2 Q.B. 326.

41. Soney Lal Jha v. Darbdeo Narain Singh, 14 P. 461: 1935 P. 167: 155 I.C. 470. On the question whether the declarant should have personal knowledge of the fact, see Reg. v. Hanmanta, 1 B. 610; Maroti v. Mahadeo, 226 I.C. 307, (personal knowledge held essential); on the relevancy of collateral matters mentioned in the entries, see Woodroffe, Ev., 8th Ed. 324; Field, Ev., 8th Ed., 175.

42. Tika Ram v. Moti Lal, 52 A. 464. 126 I.C. 29: 1930 A. 299; Dukhu Mia v. Jagdish Nath Roy Bahadur, 90 I.C. 564: 1926 C. 359; Ram Sarup Kamkar v. Bhagwat Prosad, 57 I.C. 194; Umed Ali v. Habib-ulla, 47 C. 266: 56 I.C. 38; Sew Prasad v. Radha Mohan Sahay, 37 I.C. 877.

43. Jabbar Ali Sardar v. Manmohan Pandey, 55 C. 1216. 114 I.C. 485: 1929 C. 110; Ambica Charan Kundu v. Kumud Mohan Chaudhury, 110 I.C. 521: 1928 C. 893; Dukhu Mia v. Jagdish Nath Roy Bahadur, 90 I.C. 564: 1926 C. 359; Dukha Mandal v. Grant, 16 I.C. 467; Pritam Singh v. Tilak Singh, 1954 Pepsu 14.

44. Sections 107 and 108; Hari Chintaman Dikshit v. Moro Lakshman, 11 B. 89.

of business must also be proved.⁴⁵ A statement is not admissible under this clause if it is made, not in the ordinary course of business,⁴⁶ but in the ordinary course of gossip.⁴⁷

If the statement is in writing, it must be duly proved.—Where the statement is in writing it must be proved to be in the handwriting of the person alleged to have made it. This may be done by adopting any recognised mode of proving handwriting, e.g., by calling a witness who saw the deceased write, or who is acquainted with his handwriting⁴⁸ or by expert testimony.⁴⁹ If the entry is more than 30 years old, the proof of handwriting may, in appropriate cases, be dispensed with.⁵⁰ For modes of proving handwriting, see notes to section 67.

Statement must have been made in the ordinary course of business and not on a special occasion or for a special purpose.—Expressions similar to the expression “in the ordinary course of business” occur in other parts of the Act.¹ In using this expression, the Legislature probably intended to allow to be admitted in evidence statements similar to those admitted in England as coming under that description. The exception to the general rule against hearsay, enacted in this clause, extends only to statements made during the course, not of any particular transaction of an exceptional kind, but of business or professional employment in which the declarant was ordinarily or habitually engaged.² Therefore, recitals of boundaries contained in a mortgage-deed executed by a deceased agriculturist are inadmissible under this clause, as the mortgage-deed itself is not a statement made in the ordinary course of business, it not being the profession, trade or business of an agriculturist to execute mortgage-deeds;³ and the same will be the result if such recitals are contained in a sale certificate in favour of a purchaser in a Court sale.⁴ In a case of the Oudh Chief Court, however, it has been held that recitals, contained in a receipt executed by a deceased person, as to the ownership of property adjacent to the property in respect of which the receipt is executed, are admissible in evidence under this clause to prove the ownership of the adjoining property, as the receipt is a statement made by a deceased person in the ordinary course of business and consists of an acknowledgment written or signed by him of the receipt of money.⁵ A certificate of a Chamber of Commerce, testifying to the existence of a strike of coal miners which re-

45. *Dukhu Mia v. Jagdish Nath Roy Bahadur*, 90 I.C. 564: 1926 C. 359; *Umed Ali v. Habibulla*, 47 C. 266: 56 I.C. 38; but see *Baid Nath Sahay v. Nanku Mahton*, 29 I.C. 219.

46. *Kolangorath Raman Nayar v. Kannothe*, 31 I.C. 184.

47. *Ajodhi v. E.*, 56 I.C. 582: 21 Cr. L.J. 486.

48. Section 47.

49. Section 45.

50. Section 90; *Hari Chintaman Dikshit v. Moro Lakshman*, 11 B. 89.

1. See sections 16, 34, 47, 114 and the Explanation to ill. (c) to section 114.

2. *Girdhardas Coorji v. Kerawala Karsandas & Co.*, 93 I.C. 622: 1926 B. 253; *Sheonandan Singh v. Jeonandan Dusadh*, 1 I.C. 376: 13 C.

W.N. 71; *Ningawa v. Bharmappa*, 23 B. 63; *Guru Charan Rudra Pal v. Mafijuddin Molla*, 65 C.L.J. 603; *Soney Lal Jha v. Darbdeo Narain Singh*, 14 P. 461: 1935 P. 167; see also *Ambalavana Pillai v. Gourie Ammal*, 1936 M. 871; but see *Ramamurthi v. Subba Rao*, 1937 M. 19: 167 I.C. 30.

3. *Abdullah v. Kunja Behari Lal*, 12 I.C. 149: 14 C.L.J. 467; *Ningawa v. Bharmappa*, 23 B. 63; see *Soney Lal Jha v. Darbdeo Narain Singh*, 14 P. 461: 1935 P. 167: 155 I.C. 470.

4. *Ambica Charan Kundu v. Kumud Mohan Chaudhury*, 110 I.C. 521: 1928 C. 893.

5. *Ahmad Shahji v. Jamal Ahmad*, 113 I.C. 414: 1928 O. 248; see also *Natwar v. Alkhu*, 18 I.C. 752.

sulted in the shortage of coal supplies and difficulty of manufacture in the mills by which the goods in suit had to be supplied, is not a statement made "in the ordinary course of business", but is a statement made for the special purpose of meeting a possible or existent dispute and is, therefore, inadmissible under this clause, which contemplates a statement not specially made in connection with the dispute, but in the routine of business, such as in trade accounts and correspondence.⁶ The phrase "in the ordinary course of business" is used to indicate the current routine of business which was followed by the person whose declaration is sought to be introduced. Where there is not only no evidence that there was any such current routine of business but actually no evidence that the practice had ever been adopted on any other occasion, much less that it was habitually adopted on all occasions, the statement will be inadmissible. Thus, where the statement of a deceased person to his wife that he had lent money to the defendant was sought to be given in evidence to prove the loan, the statement was held irrelevant.⁷ The business referred to in this clause may, however, be of a temporary character.⁸ The **post mortem** report of a deceased Civil Surgeon, however, is a document prepared in the ordinary course of business, or in the discharge of his professional duty, and is, therefore, admissible under this clause.⁹ Similarly an injury report prepared by the Medical Officer can be proved by his compounder and is admissible if the attendance of the Medical Officer cannot be procured without delay and expense.¹⁰ A deposition made by a **patwari** in an inquiry in the course of a revenue settlement does not fall within this or any other clause of the section,¹¹ nor can a memo of the amount spent in building a house be said to have been made by the deceased writer of the memo, in the ordinary course of business.¹² A statement made by a midwife to her paramour that she attended a confinement and there witnessed the murder of a new born child is not a statement in the ordinary course of business but in the ordinary course of gossip.¹³ A translation of a **parwana** or grant forming an enclosure to the report of a public officer is not admissible under this clause as secondary evidence of the contents of the grant.¹⁴ Where in a criminal case relating to the possession of land the parties appointed a **mukhtear** as an arbitrator and agreed to abide by his decision, and the **mukhtear** accordingly made a local enquiry and submitted a report, the report was held not to be a statement made in the ordinary course of business.¹⁵ It is not necessary that the entry should be against the interest of the person who makes it.¹⁶ Upon the question, whether a leading **talukdar** was a convert to Islam or was the chief of a Rajput clan, it is permissible and important to prove that the fact of such

6. *Girdhardas Coorji v. Kerawala Karsandas & Co.*, 93 I.C. 622: 1926 B. 253.

7. *Abdulla v. Ma E. Kin*, 11 I.C. 854; but see *Ramamurthi v. Subba Rao*, 1937 M. 19: 167 I.C. 30.

8. *Sheonandan Singh v. Jeonandan Dusadh*, 1 I.C. 376: 13 C.W.N. 71.

9. *Mohan Singh v. E.*, 85 I.C. 647: 1925 A. 413: 26 Cr. L.J. 551.

10. *State v. Rakshpal Singh*, 1953 A. 520: 1953 A.L.J. 416: 1953 Cr. L.J. 1240.

11. *Deonarayan Singh v. Dwarka Prasad Singh*, 109 I.C. 136: 1928 P. 429.

12. *Narhari Hari Vaidya v. Ambat*

Balkrishna Sansarikar, 44 B. 192: 56 I.C. 316.

13. *Ajodhi v. E.*, 56 I.C. 582. 21 Cr. L.J. 486.

14. *Ambalavana Pandarasannadhi v. Kuppachi Janaki Ammal*, 35 I.C. 201; but see *Seethayya v. Subramanya Somayajulu*, 52 M. 453: 56 I.A. 146: 117 I.C. 507: 1929 P.C. 115; *Subrahmanya Somayajulu v. Seethayya*, 46 M. 92: 70 I.C. 729: 1923 M. 1 (F.B.).

15. *Guru Charan Rudra Pal v. Mafjuddin Molla*, 65 C.L.J. 603.

16. *Ambalavana Pillai v. Gourie Ammal*, 1936 M. 871.

conversion was unknown to the district and local officers and was not ascertainable from anything to be found in official publication. Such evidence is admissible under section 32(2), Evidence Act.¹⁷

Books kept in the ordinary course of business.—Entries in books of account kept in the ordinary course of business are statements made by persons who made those entries in the ordinary course of business. That those persons are dead or cannot be found both in the sense as to their identity (i.e., who they were) and in regard to their whereabouts (i.e., where they are) may be safely inferred from the dates of the entries. It is not necessary that the names of the persons who made such entries must be known before the expression “who cannot be found” can be applied to them.¹⁸ Entry made by father in the usual and ordinary course of business in his account books regarding the birth of a daughter and expenses incurred on the occasion is admissible.¹⁹ For meaning of “books”, see notes to section 34.

Peon's indorsement of refusal on a letter; report of a process-server.—An indorsement on the cover of a registered letter that the cover had been tendered to the addressee on a certain day and had been refused by him is admissible under this clause, if the other requirements of the section are fulfilled.²⁰ A report of a deceased process peon also is admissible under this clause.²¹

Statements in the diary of a deceased Police Officer.—A Police Officer while making entries in his diary in the course of investigation into an offence does so in the course of his professional duty. Such entries are, therefore, admissible in evidence under this clause, subject, of course, to the provisions of section 162, Cr. P. Code. ²

Statements made by deceased deed writers admissible to prove execution of deeds.—Section 67 of the Act enacts that if a document is alleged to have been signed by any person, the signature must be proved to be in that person's handwriting. A signature may, of course, be proved in several ways.²² A statement, in the ordinary course of business, by a deceased person that a certain document was signed by a certain person is admissible proof of the signature. Therefore, a statement in a deed by a professional deceased deed writer that the mark or signature on a document is that of the executant is admissible, and may be sufficient proof, provided the document is proved to have been written by the deed writer in the ordinary course of his business.²⁴

Statements by deceased bhats, family chroniclers and priests as to relationship, births, deaths and marriages.—Bhats are heralds who are interested in keeping kursinamas (pedigree tables).²⁵ Similarly, family chroniclers are professional men who keep such records in the ordinary

17. Keolapati v. Raja Amar Krishna Narain Singh, 1939 P.C. 249.

18. Dogar Mal v. Sunam Ram, 1944 L. 58.

19. Mirabai v. Kaushalayabal, 1949 N. 235; I.L.R. 1948 N. 794; 1949 N. L.J. 154.

20. Gobinda Chandra Saha v. Dwarka Nath Patita, 26 I.C. 962; 20 C.L.J. 455; 19 C.W.N. 489.

21. Lall v. Rajkishore Narain Singh,

13 P. 86; 147 I.C. 101; 1933 P. 658.

22. Abdul Aziz v. E., 140 I.C. 578; 1932 A. 442; 34 Cr. L.J. 109.

23. See as to this, notes to section 67

24. Lahini v. Bala, 77 I.C. 798; 1922 N. 227; Abdulla Paru v. Gannibai, 11 B. 690; Muhammad Khan v. Ghulam Rasul, P.L.D. 1952 L. 40.

25. Kartic Chandra Chakravarty v. Gossain Protap Chandra, 66 I.C. 894; 1921 C. 482; 25 C.W.N. 908.

course of their business.²⁶ Hence, statements as to family pedigree in books kept by a deceased family priest or chronicler are admissible, under this clause,²⁷ on such family incidents as births, deaths, etc., which would ordinarily be recorded by him in such books. An entry as to the amount of dower of a Muhammadan lady, in a register of marriages kept by a deceased priest, is an entry made in the discharge of professional duty and, therefore, admissible under this clause.²⁸ Panjis maintained by Panjikars who are professional genealogists and systematically maintain pedigree tables, are admissible under this section.²⁹

Entries of death or birth in the diary of a deceased chaukidar.—It has been remarked obiter in a case,³⁰ and held directly in another,³¹ that entries of birth or death in the diary of a deceased illiterate chaukidar, made not by the chaukidar himself but by someone else at his instance, are inadmissible under this clause, if it is not shown to be the duty of the latter to make such entries in the ordinary course of business.³²

Correctness of age of accused.—Evidence of relative more valuable—cannot be rejected as being interested.³³

Entries in hudabandi, chowhaddibandi, jamabandi, jamawasilbaqi, talab-baqi or collection papers and teiskhana registers, &c.—Entries in hudabandi,³⁴ chowhaddibandi,³⁵ Jamabandi,³⁶ Jamawasilbaqi,³⁷ talab-baqi, or collection papers,³⁸ are relevant under this clause, if they were made in the ordinary course of zamindari business, and the person who

26. Abdul Gafur v. Hussain Bibi, 12 L. 336; 58 I.A. 188; 130 I.C. 612; 1931 P.C. 45; Hazarilal v. Har Govind, 48 I.C. 375.

27. Acharaj Ram v. Ganesh Das, 151 I.C. 622; 1934 Pesh. 78; Balak Ram High School, Panipat v. Nanu Mal, 11 L. 503; 128 I.C. 532; 1930 L. 579; Amritsaria v. Prabh Dial, 89 I.C. 989; 1925 L. 157; Bura v. Nank, 84 I.C. 912; 1925 L. 281; Anandi v. Nand Lal, 46 A. 665; 83 I.C. 618; 1924 A. 575; Mohansingh Umed Ramol v. Dalpatsingh Hanbaji, 46 B. 753; 67 I.C. 235; 1922 B. 51; Kartar Singh v. Kirpa Singh, 1921 L. 380.

28. Zakeri Begum v. Sakina Begum, 19 C. 689; 19 I.A. 157 (P.C.).

29. Sitaji v. Bijendra Narain, 1954 S C. 601.

30. Naina Koer v. Gobardhan Singh, 37 I.C. 424.

31. Chandrama Kuer v. Ramgayan, 67 I.C. 57; 1922 P. 111.

32. According to these cases, if the deceased chaukidar had been literate and himself made the entry, the entry would have been admissible. Thus the admissibility of the entry depends, according to these cases, on the literacy of the chaukidar. The clause, however, applies to written and verbal statements alike, and it seems doubtful, whe-

ther the fact that the chaukidar dictates the entry and does not, owing to his being illiterate, make it by his own hand would make all the difference.

33. Ganga Dhar Iba v. State, 1969 All. Cr. R. 41; 1969 All. W.R., (H.C.) 41.

34. Gopeswar Sen v. Bijoy Chand Mahatab Bahadur, 55 C. 1167; 108 I.C. 883; 1928 C. 854; see also Rajnandni Debi v. Manmatha Pal, 1941 C. 223.

35. Gadadhar v. Sarat Chandra, 1941 C. 193.

36. Mon Mohan Pandey v. Hari Nath Chaudhury, 110 I.C. 338; 1928 C. 408; Dukhu Mia v. Jagdish Nath Roy Bahadur, 90 I.C. 564; 1926 C. 359; Charitter Rai v. Kailash Behari, 44 I.C. 422; Dukha Mandal v. Grant, 16 I.C. 467; see also Durga Priya Choudhury v. Hazra Gain, 62 I.C. 453; 1921 C. 345.

37. Jabbar Ali Sardar v. Monmohan Pandey, 55 C. 1216; 114 I.C. 485; 1929 C. 110; Mon Mohan Pandey v. Hari Nath Chaudhury, 110 I.C. 338; 1928 C. 408; Dukhu Mia v. Jagdish Nath Roy Bahadur, 90 I.C. 564; 1926 C. 359.

38. Umed Ali v. Habibulla, 47 C. 266; 56 I.C. 38; Bhaba Sundari Devi v. Taira Nasya, 6 I.C. 369.

made them cannot be called as a witness for any of the reasons mentioned in the section; and when they become relevant under this clause, corroboration ceases to be a legal necessity.³⁹ **Teiskhana** registers prepared by a **patwari**, under the rules framed by the Board of Revenue under section 16 of Regulation XII of 1817, are not admissible under section 35 of the Act,⁴⁰ but entries in them may become admissible under this clause of the section,⁴¹ if the other conditions prescribed by the section are established. A revenue surveyor's report,⁴² entries in the **khatiana** and **chitha** prepared by a deceased **amin**,⁴³ and entries in the register of **chaukidari chakran** lands,⁴⁴ are relevant under this clause.

A statement admissible under this clause may amount to an admission in favour of its maker and may be admissible in his lifetime; road-cess returns.—Ordinarily, an admission cannot be proved in favour of the person making it; but when the admission is of such a nature that, if the person making it were dead, it would be relevant as between third persons under this section, it may be proved in the life-time and in favour of the person making it.⁴⁵ Thus, entries of payments, made by a creditor in the **samadaskat** book of the debtor, though admissions in the former's favour, are admissible, as they fall within the meaning and language of section 31(2).⁴⁶ In the case of road-cess returns, however, the rule making admissions admissible in one's own favour is subject to the special provisions of section 95 of the Road-Cess Act, which makes road-cess returns admissible only against the persons by whom or on whose behalf they are filed, but not in their favour, notwithstanding the provisions of section 21 and section 32 of the Evidence Act.⁴⁷ Thus, a return filed by a landlord is not admissible in his favour,⁴⁸ whether it is put in to prove an admission in favour of the landlord, or indirectly for some other purpose.⁴⁹ But the rule in section 95 of the Road-Cess Act is not exhaustive, and these returns may be admissible against,⁵⁰ as well as in favour of,¹ persons other than those filing them. Section 95 of the Road-Cess Act has no application where the road-cess return is given in evidence by a party who did not file it.² Thus, road-cess returns filed by a Hindu widow are admissible in

39. *Jabbar Ali Sardar v. Monmohan Pandey*, 55 C. 1216: 114 C. 485: 1929 C. 110; *Mon Mohan Pandey v. Hari Nath Chaudhury*, 110 I.C. 338: 1928 C. 408; *Gopeswar Sen v. Bijoy Chand Mahtab Bahadur*, 55 C. 1167: 108 I.C. 883: 1928 C. 854; *Charitter Rai v. Kailash Behari*, 44 I.C. 422; *Dukha Mandal v. Grant*, 16 I.C. 467.

40. *Samar Dasadh v. Juggal Kishore Singh*, 23 C. 366; *Baij Nath Singh v. Sukhu Mahton*, 18 C. 534; *Chalho Singh v. Jharo Singh*, 39 C. 995: 18 I.C. 61.

41. *Suraitulla Sarkar v. Hafizulla Ahmed*, 12 C.W.N. cliv.

42. *Mg. Po Nyein v. Maung My*, 27 I.C. 777.

43. *Gopeswar Sen v. Bijoy Chand Mahtab Bahadur*, 55 C. 1167: 108 I.C. 883: 1928 C. 854.

44. *Sheonandan Singh v. Jeonandan Dusadh*, 1 I.C. 376: 13 C.W.N. 71.

45. Section 21.

46. *Jethebai v. Putlibai*, 17 I.C. 722: 14 Bom. L.R. 1020.

47. *Hem Chandra Chowdhry v. Kali Prasanna Bhaduri*, 26 C. 832; *Swarnamoyi v. Sourindra Nath Mitra*, 89 I.C. 747: 1925 C. 1189; see also *Mahabir Ram Marwari v. Bhadai Mandar*, 1937 P. 561.

48. *Promode Chandra Roy Choudhury v. Binayakdas Acharjya Choudhury*, 75 I.C. 201: 1923 C. 611: 27 C.W.N. 548; see *Mohendra Narain Singh v. Ajodhya Prosad Singh*, 39 C. 1005: 15 I.C. 284.

49. *Ram Kumar Das v. Harnarain Das*, 92 I.C. 104: 1926 C. 727.

50. *Chalho Singh v. Jharo Singh*, 39 C. 995: 18 I.C. 61.

1. *Chandra Mohan Maiti v. Kinaram Maiti*, 79 I.C. 412: 1925 C. 408; *Mohendra Narain Singh v. Ajodhya Prosad Singh*, 39 C. 1005: 15 I.C. 284.

2. *Ram Prasad Roy v. Sham Narain*, 6 C.L.J. 22.

favour of the reversionary heir, as he does not claim through the widow;³ and those filed by an interior landlord are admissible in favour of the superior landlord.⁴ Road-cess returns filed by some of the co-owners are admissible against the remaining co-owners,⁵ and may, for certain purposes, be admissible in their favour.⁶ Where a return, jointly filed, becomes admissible against one of the persons filing it, it is no objection to its admissibility that by being admissible against him it indirectly becomes admissible in favour of the others.⁷ The Privy Council ruling in **Hem Chandra v. Kali Prosanna**⁸ is clear authority for the admissibility of road-cess returns.⁹

Entries in books of account relevant under section 34 do not require corroboration, if they become relevant under section 32 also.—Accounts, relevant only under section 34, are not alone sufficient to charge a person with liability; corroboration is required. But where accounts are relevant under section 32(2) also, they do not require corroboration as a matter of law. It is within the discretion of the court to require, or to dispense with, corroborative evidence.¹⁰ “Fortunately, however, in practice we seldom come across a case in which the entry which comes under section 32, clause (2), is really sought to be used alone to charge any person with liability.”¹¹ Where the books were kept by a servant since deceased, but the entries showed that certain payments had been made through certain other persons, it was held that, though the books were admissible under this clause, it was necessary to call the persons making the payment, to prove that the payments were, in fact, made.¹² **Zamindari** papers can be used as independent evidence, provided it is shown that the persons who prepared them are dead or cannot be found, but the weight to be attached to them must depend on the circumstances.¹³ In the absence of proof, direct or presumptive, that their writer is dead, books of account, however old, are admissible only under section 44, and

3. **Lachmi Prosad Chowdhury v. Jagmohan Lal Chaubey**, 22 I.C. 594: 18 C.L.J. 633.
4. **Mohendra Narain Singh v. Ajodhya Prosad Singh**, 39 C. 1005: 15 I.C. 284.
5. **Intaz v. Dina Nath De Sarkar**, 53 C. 615: 96 I.C. 72: 1926 C. 856; **Chalho Singh v. Jharo Singh**, 39 C. 995: 18 I.C. 61.
6. **Hem Chandra Chowdhry v. Kali Prosanna Bhaduri**, 30 C. 1033: 30 I.A. 177 (P.C.).
7. **Beni Madhab Dandapat v. Dina Bundhu Dutt**, 3 C.W.N. 343.
8. **Hem Chandra Chowdhry v. Kali Prosanna Bhadori**, 30 C. 1033: 30 I.A. 177 (P.C.).
9. **Chalho Singh v. Jharo Singh**, 39 C. 995: 18 I.C. 61.
10. **Abdul Wahad v. Nagendra Chandra**, 1940 C. 524; **Maroti v. Mahadeo**, 226 I.C. 307; **Jabbar Ali Sardar v. Monmohan Pandey**, 55 C. 1216: 114 I.C. 485: 1929 C. 110; **Mon Mohan Pandey v. Hari Nath Chaudhury**, 110 I.C. 338: 1928 C. 408; **Rani v. Firm Bahadur Mal-**

- Buti Mal**, 63 I.C. 946: 1922 L. 119; **Charitter Rai v. Kailash Behari**, 44 I.C. 422; **Ramaswami Naik v. Ramanadhan Chetty** 22 I. C. 627; **Dukha Mandal v. Grant**, 16 I.C. 467; **Bhaba Sundari Devi v. Taira Nasya**, 6 I.C. 369; **Daji Abaji Khare v. Govind Narayen Bapat**, 10 Bom. L.R. 811; **Rampyarabai v. Balaji Shridhar**, 28 B. 294; but see the judgment of Mukerji, J., in **Gopeswar Sen v. Bijoy Chand Mahatab Bahadur**, 55 C. 1167: 108 I.C. 883: 1928 C. 854, where the correctness of this view has been questioned and corroboration has been considered to be necessary both as a matter of law and as a matter of practice.
11. Per Mukerji, J., in **Gopeswar Sen v. Bijoy Chand Mahatab Bahadur**, 55 C. 1167: 108 I.C. 883: 1928 C. 854.
12. **Sew Prasad v. Radha Mohan Sahay**, 37 I.C. 877.
13. **Chaturbhuj Singh v. Sarada Charan Guha**, 11 P. 701: 141 I.C. 157: 1933 P. 6.

require the usual corroboration.¹⁴ Books, which are not regular books of account and, therefore, not admissible under section 34, may be admissible as entries or memoranda under this clause of section 32.¹⁵ Where the accounts consist of loose sheets which can be substituted and the entries can be interpolated at different places, if one were so minded, it is not possible to say that the entries have been made in the regular course of business and have the necessary probative value.¹⁶

Evidentiary value of loose sheets of almanac.—As regards the entries in the almanac, it is necessary only to point out that these are loose sheets of papers with blanks left at different places. The sheets and entries could be substituted or interpolated at different places, if one were so minded. Having regard to these defects, it is not possible to say that the entries have been made in the regular course of business and have the necessary probative value.¹⁷

Section 32(2) and (6) Panjis (genealogical trees) maintained by Panjikars among Naithal Brahmins.—The Panjis are maintained by Panjikars who are professional genealogists. They systematically maintain pedigree tables in the community of Naithal Brahmins. That they were ancient and had come from proper custody. So they were admissible under section 32(2) and (6).¹⁸

Statements in commercial documents.—Statements, made by persons deceased or alive, in certain commercial documents described in the schedule to Act XXX of 1939, are relevant; and such statements shall, in the case of documents mentioned in Part I of that schedule, and may, in the case of documents mentioned in Part II of that schedule, be presumed to be accurate.¹⁹

CLAUSE (3): DECLARATIONS AGAINST INTEREST

Principle and reason of the rule.—Under this section, a statement of a dead person can be admitted in evidence, when it is against the pecuniary or proprietary interest of the person making it. The principle on which such statement is regarded as admissible in evidence is that, in the ordinary course of affairs, a person is not likely to make a statement to his own detriment, unless it is true.²⁰ "Self-interest is a sufficient security against wilful mis-statement, mistake of fact, or want of information on the part of the declarant. The place of the test of oath and cross-examination is in some measure supplied by the circumstances of the declarant and the character of his statement".²¹ Under this clause, statements by a deceased person are admissible, provided (i) he had personal knowledge of the facts stated, (ii) the facts were to his immediate prejudice, (iii) he knew the facts to be prejudicial and (iv) the interest affected by the statements was pecuniary or proprietary.²² Illustrations (e) and (f) refer

14. *Durga Shanker v. Ganga Sahai*, 142 I.C. 889: 1932 A. 500.

15. *Babhnaji v. Ratanlal*, 148 I.C. 1033: 1934 N. 106.

16. *Ganesh Prasad Ray v. Narendra Nath Sen*, 1953 S.C. 431.

17. *Mahasay Ganesh Prasad Ray v. Narendra Nath Sen*, 17 Cut. L.T. 73.

18. *Sitaji v. Bijendra Narain*, A.I.R. 1954: S.C. 601.

19. See Appendix D.

20. *Dal Bahadur Singh v. Bijai Bahadur Singh*, 52 A. 1: 57 I.A. 14: 122 I.C. 8: 1930 P.C. 79; *Savitri Devi v. Ram Ran Bijoy Prosad Singh*, 1950 P.C. 1: 63 M.L.W. 45: 54 C.W.N. 233: 76 I.A. 255: 1950 A. L.J. 134: 1950, 1 M.L.J. 163.

21. Woodroffe, Ev., 9th Ed., 324.

22. *Ramanathan Chetty v. Murugappa Chetty*, 33 I.C. 969.

to this clause, and the leading case in English law on the subject is *Higham v. Ridgway*.²³

Condition precedent to the admissibility of statements under this clause; proof that the declarant cannot be called as a witness is necessary.
—See notes to clause (2) under this heading.

If the statement is in writing, it must be duly proved.—See notes to clause (2) under this heading.

Difference between admissions and statements admissible under this clause.—An admission, being a statement which suggests any inference as to a fact in issue or a relevant fact,²⁴ may take the form of a self-harming or a self-serving statement. But when an admission takes the form of a self-serving statement, section 21 makes it inadmissible in favour of its maker or his representative in interest, unless it is of such a nature that, if its maker were dead, it would be relevant as between third persons under section 32. Therefore, a statement which amounts to a declaration against interest within the meaning of this clause is receivable in favour of as well as against strangers after its maker is dead; it is also admissible in favour of the maker or his representative in interest during the maker's life-time. Thus, where a landlord purchased the holding of his tenant in execution of a decree, a statement by the landlord in the sale certificate that the tenant held under him 20 bighas was held admissible in the landlord's favour to show the area purchased by him in execution sale, on the ground that the statement admitting that his land was subject to a tenancy was in derogation of his proprietary interest.²⁵ Documents which do not come under any of the clauses to section 32 are admissible against a person, if they would have been admissible as admissions against persons through whom he claims.²⁶

Recitals in a consent decree are not "statements".—Recitals in a consent decree which sets out the terms of the arrangement arrived at between the parties, but does not embody statements of the parties as to their rights in the subject-matter of the litigation, are not "statements" and are, therefore, inadmissible under this clause.²⁷

Statements against pecuniary interest.—A statement is against the pecuniary interest of a person when it has the effect of charging him with a pecuniary liability to another or discharging some other person upon whom he would otherwise have a claim.²⁸ A statement whereby a man charges himself with the receipt of money is in most cases a statement against his pecuniary interest.²⁹ A statement by the executant of a sale deed that he was liable for a particular amount is a statement against his pecuniary interest.³⁰ A petition by a person that a pension allowed to his grandfather be allotted to him and two other brothers of his, whose legitimacy is doubtful, amounts to a statement against interest.³¹ A state-

23. (1808) 10 East 109.

24. Section 17.

25. *Manik Biswas v. Jagadindra Nath Roy Bahadur*, 24 I.C. 283.

26. *Rani Srimati v. Khagendra Narayan Singh*, 31 C. 871; 34 I.A. 127 (P.C.).

27. *Jagdish Chandra De v. Harihar De*, 78 I.C. 219; 1924 C. 1042.

28. *Deo v. Robson*, 15 East 32.

29. *Appavu Chettiar v. Nanjappa Goundan*, 20 I.C. 792.

30. *Babhnaji v. Ratanlal*, 148 I.C. 1033; 1934 N. 106.

31. *Baqar Ali Khan v. Anjuman Ara Begam*, 25 A. 236; 30 I.A. 94 (P.C.).

ment by a person that certain monies deposited by him in the name of another person belonged to him is an admission in his own favour and not a statement against his interest; it is, therefore, inadmissible.³² Attestation of a deed of adoption by the sons of the adopter is a statement against the pecuniary interest of the sons.³³ An acknowledgment, made by or by the direction of a deceased creditor, of money received on account of a debt or interest due to him is receivable as a declaration against interest, if made before, but not after, the debt has become statute-barred.³⁴ Whether such acknowledgment is admissible as an entry against interest depends upon the question whether it was made *bona fide* before the claim became barred by limitation, and it ought not to be admitted until it be shown by evidence *dehors* the instrument that it was made at a time when it was against the interest of the creditor to make it.³⁵ An entry of payment made by the debtor is inadmissible whether it is made before or after the claim became time barred and whether it relates to the payment of interest or part-payment of the principal. An entry made after the period of limitation does not extend time and is not, therefore, against the debtor's interest, whereas an entry made before the expiry of the period of limitation is only evidence of payment and, therefore, in favour of the debtor.³⁶

Road-cess returns.—The Privy Council ruling in *Hem Chandra Chowdhury v. Kali Prasanna Bhaduri*,³⁷ is clear authority for the admissibility of road-cess returns.³⁸ By section 95 of the Road-Cess Act, road-cess returns are not admissible in favour of the person filing them or the representative in interest of such person notwithstanding the provisions of sections 21 and 32 of the Act;³⁹ but section 95 of the Road-Cess Act not being exhaustive, the returns may be admissible in favour of persons other than those filing them and their representatives in interest.⁴⁰ Thus, a road-cess return filed by a Hindu widow is admissible in favour of the reversionary heir, as he does not claim through the widow.⁴¹ Road-Cess returns filed by some of the co-owners are admissible against the remaining co-owners,⁴² and those filed by an inferior landlord are admissible in favour of the superior landlord.⁴³ Statements made in road-cess returns by all the proprietors can be used by one of them against the others.⁴⁴

32. *Hirabai Gopaldas v. Dhanjibai B. Kavarana*, 102 I.C. 145: 1927 B. 433.

33. *Nagammal v. Sankarappa Naidu*, 54 M. 576: 131 I.C. 9: 1931 M. 264; see also *Gnaumuthu Nadan v. Veilukanda Nadathi*, 79 I.C. 2: 1924 M. 542.

34. *Phipson, Ev.*, 6th Ed., 279; *Briggs v. Wilson*, (1853) 5 De. G.M. & G. 12.

35. *Field, Ev.*, 8th Ed., 181; *Woodroffe, Ev.*, 9th Ed., 342; *Taylor*, §§ 693—696.

36. See section 20, Limitation Act.

37. 30 C. 1033: 30 I.A. 177 (P.C.).

38. *Chalho Singh v. Jharo Singh*, 39 C. 995: 18 I.C. 61; in *Hem Chandra Chowdhury v. Kali Prasanna Bhaduri*, 30 C. 1033: 30 I.A. 177 (P.C.), the Subordinate Judge had admitted the returns under this

clause, but the Privy Council did not refer to any section of the Act under which the returns were held admissible.

39. *Hem Chandra Chowdhury v. Kali Prasanna Bhaduri*, 26 C. 832; *Chandra Mohan Maiti v. Kinaram Maiti*, 79 I.C. 412: 1925 C. 408; *Swarnamoyi v. Sourindra Nath Mitra*, 89 I.C. 747: 1925 C. 1189.

40. *Chandra Mohan Maiti v. Kinaram Maiti*, 79 I.C. 412: 1925 C. 408.

41. *Lachmi Prosad Chowdhury v. Jagmohan Lal Chaubey*, 22 I.C. 594: 18 C.L.J. 633.

42. *Chalho Singh v. Jharo Singh*, 39 C. 995: 18 I.C. 61.

43. *Mohendra Narain Singh v. Ajodhya Prosad Singh*, 39 C. 1005: 15 I.C. 284.

44. *Mahabir Ram Marwari v. Bhadaï Mander*, 1937 P. 561.

Statements against pecuniary or proprietary interest of person making it or when, if true, would expose him to prosecution—Statement by another person that he had left money to the accused is not relevant under section 32(3).⁴⁵

B. N.'s widow who was a party to the suit had made a statement in a prior proceeding that "Her husband's father went away one month after her husband's death", thereby indicating that B. N. predeceased his father. Therefore, it became necessary to consider the admissibility of this statement as well as the value to be attached to it under section 32(3) of the Evidence Act. It was held that under section 32(3) of the Evidence Act, a statement of a person who is dead is admissible when the statement is against the pecuniary or proprietary interest of the person making it, or when if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages. In order the statement may be admissible, the person making the statement must know that it is against his interest and the question whether the statement was made consciously with the knowledge that it was against the person making it would be a question of fact in each case, depending on the circumstances in which the statement was made, except when the statement is categorical in terms. There can hardly be any direct evidence to show that the person making the statement in fact knew that the statement was against his interest and so in most cases knowledge would have to be inferred from the surrounding circumstances.⁴⁶

Charging and discharging entries in accounts, discharging entries outbalancing the charging entries; charging entries admissible.—Accounts are admissible, some items of which charge the declarant, though other connected items discharge him or even show a balance in his favour; for in the former case it is not to be presumed that a man will charge himself falsely for the mere purpose of getting a discharge, and in the latter case the debit items would still be against interest, since they diminish the balance in his favour.⁴⁷ It should, however, be noted that this principle applies only when the charging entry is sought to be used. The discharging part of the entry is admissible, unless the discharging part must necessarily be resorted to for the purpose of explaining the charging part.⁴⁸

Statements against proprietary interest; declarations in disparagement of title.—The presumption of law is that a person in possession of property is the absolute owner thereof.⁴⁹ Therefore, declarations made by a deceased person tending to cut down, charge, or fetter his presumably absolute interest are admissible as being contrary to his proprietary interest.⁵⁰ Declarations in disparagement of title to land are relevant, if they were made whilst the deceased declarant was in actual possession of the property.¹ Such declarations are receivable whether they refer to the tenure or to the extent of the property.² A statement by the owner of the land in a deed of conveyance or mortgage-deed that he was extinguishing his interest in the land by an absolute sale or placing restrictions on it by way of mortgage is a statement against the proprietary interest of the

45. *Manjunatha George v. Government of Manipur*, 1970 Cri. L.J. 812.

46. *Ramrati Kuer v. Dwarika Prasad Singh*, 1967 (2) S.C.J. 789.

47. Phipson, *Ev.*, 6th Ed., 281; Taylor, § 674; see Wigmore, § 1464.

48. *Doe v. Bevis*, 18 L.J.R. (C.P.) 1287; but see *Taylor v. Witham*, (1876) 3 Ch. D. 605.

49. Section 110.

50. Phipson, *Ev.*, 6th Ed., 279.

1. *Ramdas v. Ajudhiadas*, 63 I.C. 685.

2. *Nort.*, 180.

owner.³ A recital in a deed of gift by a widow that the gift had been already made by her deceased husband and that she was simply executing a formal document to give effect to that gift in consonance with the oral direction of the deceased is admissible evidence of the gift by the husband.⁴ A statement by a person that certain property does not belong to him but belongs to another person is obviously against his interest and, therefore, after his death, admissible in evidence under section 32(3).⁵ Similarly, a document by which a Hindu widow constitutes a person as her "heir" in her life-time is against her proprietary interest, as by it she divests herself of her widow's estate in the property.⁶ But where a Hindu widow, who after a lifelong enjoyment of her husband's property desires at the end to pass it on to her own relations and for this purpose goes through the form of adopting her brother's grandson, makes a statement in mutation proceedings that she has authority from her husband to adopt and that she has adopted a person, the statement would be inadmissible in evidence after her death, as the statement cannot be said to be against her interest.⁷ The statement of a judgment-debtor, after attachment of his property, that the property had been dedicated by him before the attachment is hardly against his interest in the circumstances supposed, and perhaps may be a statement in his own interest.⁸ Where a mortgage-deed executed by a co-sharer is attested by other co-sharers, the attestation amounts to a statement that they had no right in the property, and is thus a statement against their proprietary interest.⁹ A declaration by a person in possession that he has only a life-interest in the property is against his proprietary interest;¹⁰ but where the declarant is not in possession, a statement by him that the land of which the defendant is in possession was mortgaged by him to the defendant would be inadmissible in a suit by the deceased declarant's heir to recover possession of the property alleged to be mortgaged.¹¹ A statement by a deceased landlord that there was a tenant on the land is a statement in derogation of the landlord's proprietary interest, as it amounts to an admission that the landlord had parted with at least some of his proprietary rights in the land, namely, the right to possession.¹² Where the question is whether there was partition between the ancestors of the parties, statements made by the deceased ancestors of the parties that there was partition are admissible, as they are against the proprietary interest of the persons making them.¹³ A statement made by a deceased *sapinda* as to the circumstances under which he received a sum of money in connection with an adoption

3. *Abdullah v. Kunja Behari Lal*, 12 I.C. 149: 14 C.L.J. 467.

4. *Appasami Pillai v. Ramu Tevar*, 136 I.C. 340: 1932 M. 267.

5. *Suraj Narain v. Ratan Lal*, 40 A. 159: 44 I.A. 201: 40 I.C. 988: 1917 P.C. 12; *Venkatasubbiah Chetty v. Jumma Mosque*, 1941 M. 666.

6. *Hari Chintaman Dikshit v. Moro Lakshman*, 11 B. 89.

7. *Dal Bahadur Singh v. Bijai Bahadur Singh*, 52 A. 1: 57 I.A. 14: 122 I.C. 8: 1930 P.C. 79. The principle of this P.C. decision seems to affect the ruling in *Hari Chintaman Dikshit v. Moro Lakshman*, 11 B. 89.

8. *Harihar Prasad v. Gurugranth Sahib*, 128 I.C. 791: 1930 P. 610.

9. *Gnanamuthu Nadan v. Veilukanda Nadathi*, 79 I.C. 2: 1924 M. 542; see also *Nagammal v. Shankarappa Naidu*, 54 M. 576: 131 I.C. 9: 1931 M. 264.

10. *In re Adams Benton v. Powell*, 127 L.T. 528.

11. *Mi Nge Ma v. Nga Talok Pyu*, 29 I.C. 607.

12. *Manik Biswas v. Jagadindra Nath Roy Bahadur*, 24 I.C. 283; *Mohunt Krishen Dayal Gir v. Irshad Ali Khan*, 31 C. 965; *Golab Sao v. Chowdhury Madho*, 2 C.L.J. 5 (n); *Leelanund Singh v. Lakhputtee Thakoorain*, 22 W.R. 231.

13. *Jaitram v. Narottam*, 124 I.C. 689: 1929 N. 131.

is a statement against his pecuniary or proprietary interest.¹⁴ A statement by a woman that she was merely a concubine and not the lawful wife of a person is a statement against her proprietary interest,¹⁵ since it would deprive her of the right to succeed to the property of that person. A statement that in the declarant's family a son takes interest by birth is against the declarant's proprietary interest.¹⁶ A statement by the deceased manager of a joint Hindu family that he purchased a certain property out of his earnings in the name of his son-in-law and as a provision for him is against his pecuniary interest and, therefore, admissible under this clause.¹⁷ A statement made by a deceased member of an undivided Hindu family residing in Bengal that he is governed by the Mitakshara law is a statement against his proprietary interest and, therefore, admissible under this clause.¹⁸ A statement in a will which is against the interest of the testator is admissible even if the testator subsequently cancelled the will.¹⁹ But a statement made by a deceased Hindu in his will that his son was separate from him is a statement in his own favour and therefore not admissible to prove separation.²⁰ An assertion in a deed of gift that the subject-matter of the gift is the donor's property is not a statement against the proprietary interest of the donor.²¹

Statement of deceased person regarding separation admissible.—The statements of a particular person that he is separated from a joint family, of which he was a coparcener, and that he has no further interest in the joint property or claim to any assets left by his father, would be statements made against the interest of such person, and after such person is dead, they would be relevant under section 32(3), Evidence Act. The assertion that there was separation not only in respect of himself but between all the coparceners would be admissible as a connected matter and an integral part of the same statement.²²

Recitals of boundaries of property in deeds not inter partes, whether admissible to prove ownership or possession of adjoining property?—Recitals of boundaries of property, contained in deeds not inter partes, have been held to be admissible to prove ownership or possession of adjoining property, on the ground that, when the deed is a mortgage-deed, it amounts to a statement against the pecuniary or proprietary interest of the mortgagor, inasmuch as he admits therein that he is indebted in a certain sum of money and that this money is a charge on his property²³ and, when the deed is a deed of conveyance on the ground that it amounts to a statement against the vendor's interest, inasmuch as he admits therein

14. *Danakoti Ammal v. Balasundara Mudaliar*, 36 M. 19: 18 I.C. 989.

15. *Parbati v. Maharaj Singh*, 10 I.C. 188.

16. *Ramnath v. Sukalsi*, 78 I.C. 185: 1924 N. 330.

17. *Suraj Narain v. Ratan Lal*, 40 A. 159: 44 I.A. 201: 40 I.C. 988: 1917 P.C. 12.

18. *Sukdeb Charan Jana v. Mritunjoy Pal*, 43 C.W.N. 395.

19. *Chouda v. Rai*, 1939 N. 274.

20. *Manglo Mal Sugno Mal v. Mst. Padibai*, 1936 S. 217.

21. *Markhu Mahto v. Saharai Mahto*, 184 I.C. 246.

22. *Bhagwati Prasad Sah v. Dulhin Rameshwari Kuer*, 1951 S.C.R. 603: 1952 S.C.J. 115.

23. *Ningava v. Bharmappa*, 23 B. 63; *Thyagarajan Chetty v. Narayana Thevan*, 1940 M. 450; see *Abdullah v. Kunja Behari Lal*, 12 I.C. 149: 14 C.L.J. 467, where a mortgage-deed has been treated as amounting also to an admission of the existence of a restriction on proprietary rights; the same view can be deduced from *Leelamund Singh v. Lakhputee Thakoorain*, 22 W.R. 231.

that he is extinguishing his interest in the property conveyed.²⁴ The mortgage-deed or the deed of conveyance having thus been held to be a statement against the pecuniary or proprietary interest of the executant of the deed, on the authority of *Higham v. Ridgway*²⁵ the document is made evidence, not only of the precise fact against interest, but of all the collateral facts mentioned therein, and consequently of the possession or ownership of persons who are mentioned in the deed as possessing or owning the land adjoining the property mortgaged or conveyed.²⁶ Another ground on which recitals of boundaries of the land conveyed is held to be against interest is that a statement by the vendor that his land is limited by certain boundaries is an admission that his proprietary interest does not extend over any land beyond the boundaries mentioned in the deed.²⁷ On the strength of the argument stated above, the recitals of boundaries in deeds not *inter partes* have been held in a series of decisions to be relevant to prove the ownership or possession of persons who are mentioned in the deed as possessing or owning the adjoining land. This view originated with the Bombay High Court,²⁸ and has been accepted as sound in Allahabad²⁹ and Nagpur.³⁰ The Calcutta³¹ and Patna³² High Courts also have generally favoured this view, though the trend of their recent decisions is in the opposite direction.³³ The Madras High Court, on the other hand, holds that it is not the document but the statement that must be against interest,³⁴ and that the statement in a deed that the executant's property is bounded on the north, south, east or west by a certain other man's property is not against the executant's interest,³⁵ except on the assumption that every person must be presumed to own the universe until he makes a statement circumscribing his title. A person is presumed to own nothing until he brings into existence an effective deed with the

24. *Abdullah v. Kunja Behari Lal*, 12 I.C. 149: 14 C.L.J. 467.

25. (1808) 10 East 109.

26. *Ketabuddin v. Nafar Chandra Pattok*, 99 I.C. 907: 1927 C. 230; *Ambar Ali v. Lutfe Ali*, 45 C. 159: 41 I.C. 116.

27. *Reajaddi Sarkar v. Ganga Charan Bhattacharya*, 53 I.C. 863; *Ambar Ali v. Lutfe Ali*, 45 C. 159: 41 I.C. 116; *Abdullah v. Kunja Behari Lal*, 12 I.C. 149: 14 C.L.J. 467; see also *Ram Sarup Kamkar v. Bhagwat Prosad*, 57 I.C. 194.

28. *Ningawa v. Bharmappa*, 23 B. 63; *Haji Bibi v. The Aga Khan*, 2 I.C. 874.

29. *Tika Ram v. Moti Lal*, 52 A. 464: 126 I.C. 29: 1930 A. 299; *Natwar v. Alkhu*, 18 I.C. 752.

30. *Trimbak v. Ganesh*, 68 I.C. 314: 1923 N. 22.

31. *Pramatha Nath Roy Chowdhury v. Bejoy Singh Dudhuria*, 99 I.C. 910: 1927 C. 234; *Ketabuddin v. Nafar Chandra Pattok*, 99 I.C. 507: 1927 C. 230; *Abdul Rahim Kazi v. Jonabali Sikdar*, 68 I.C. 329: 1928 C. 299; *Reajaddi Sarkar v. Ganga Charan Bhattacharya*, 53 I.C. 863; *Ambar Ali v. Lutfe Ail*, 45 C. 159: 41 I.C. 116; *Kangali Molla v. Ben*

Madhab Biswas, 34 I.C. 534; *Imrit Chamar v. Sridhar Pandey*, 13 I.C. 120: 15 C.L.J. 7; *Abdullah v. Kunja Behari Lal*, 12 I.C. 149: 14 C.L.J. 467.

32. *Ramnandan Prasad v. Laley Tilakdhari Lal*, 145 I.C. 944: 1933 P. 636; *Ram Sarup Kamkar v. Bhagwat Prosad*, 57 I.C. 194; *Lalu Singh v. Sahdeo Singh*, 36 I.C. 610.

33. *Ambica Charan Kundu v. Kumud Mohan Chaudhury*, 110 I.C. 521: 1928 C. 893; *Kumuda Kumari Dasi v. Dilsook Roy*, 101 I.C. 542: 1927 C. 918; *Braja Mohun Das Adhikari v. Gaya Prosad Karan*, 97 I.C. 265: 1926 C. 948; *Damodar Poddar v. Jadunath Dutt*, 53 C. 448: 91 I.C. 449: 1926 J. 91 (1); *Abdul Karim v. Chhale Ahmed*, 91 I.C. 688: 1926 C. 479; *Chooni Lal Khemani v. Nil Madhab Barik*, 86 I.C. 734: 1925 C. 1034; *Pramatha Nath Choudhury v. Krishna Chandra Bhattacharjee*, 84 I.C. 420: 1924 C. 1067; *Hari Ahir v. Sri Sangat Chacha*, 152 I.C. 829: 1934 P. 617.

34. *Karupanna Konar v. Rangaswami Konar*, 107 I.C. 293: 1928 M. 105 (2).

35. *In re Daddapaneni Narayanappa*, 8 I.C. 268.

boundaries stated therein, and this being so, a document of this kind is not against, but in favour of, the proprietary interest of a person.³⁰ Therefore, the Madras High Court has held that such recitals of boundaries are not admissible under this clause of the section³⁷ and this view, as already mentioned, is supported by the later decisions of the Calcutta High Court³⁸ and some recent decisions of the Patna High Court.³⁹ The Lahore High Court also has held such recitals to be inadmissible.⁴⁰

It is submitted that the view taken of this matter by the Madras High Court is more consonant with the principle on which section 32 is based. Recitals in a deed are, strictly speaking, evidence only as against the parties to the deed and those claiming through or under them.⁴¹ As against others they are *res inter alios actae* and, as such, inadmissible, unless they come within the terms of any clause of section 32.⁴² It is clear from the words used in the opening part of section 32, viz., "statements written or verbal of relevant facts", and the words of clause (2), viz., "when the statement is against the pecuniary or proprietary interest" that the statement must not only relate to a relevant fact but must itself be against the pecuniary or proprietary interest of the person making it. The view of the Madras High Court, therefore, that it is the statement sought to be proved, and not the document containing it, which must be against interest⁴³ is supported by the terms of the section itself. Excepting some cases of the Calcutta High Court,⁴⁴ there is hardly any authority for the proposition that a mere recital of boundaries of the land transferred is against the transferor's interest. "I fail to see", said Aiyar, J.,⁴⁵ "how it is a statement against the interest of a person to say that his property is bounded on the north, south, east or west by a certain other man's property". Again, it is difficult to see how a deed of transfer as such is against the transferor's interest. In fact, the deed is an assertion on the part of the transferor that he has a transferable interest in the property. The inherent character of such a deed is not that of

36. Karupanna Konar v. Rangaswami Konar, 107 I.C. 293: 1928 M. 105 (2).

37. Alagiri Navakar v. Perumal Navakar, 80 L.W. 422; Karupanna Konar v. Rangaswami Konar, 107 I.C. 293: 1928 M. 105 (2); Saripalli Venkatarayagopala Raju v. Fota Narasayya, 26 I.C. 747; In re Daddapaneni Narayanappa, 8 I.C. 268; contra Thyagarajan Chetty v. Narayana Thevan, 1940 M.W.N. 80: 1940 M. 450.

38. Ambica Charan Kundu v. Kumud Mohan Chaudhury, 110 I.C. 521: 1928 C. 893; Kumuda Kumari Das v. Dilsook Roy, 101 I.C. 542: 1927 C. 918; Braja Mohun Das Adhikari v. Gaya Prosad Karan, 97 I.C. 265: 1926 C. 948; Abdul Karim v. Chhale Ahmad, 91 I.C. 688: 1926 C. 479; Chooni Lal Khemani v. Nil Madhab Barik, 86 I.C. 734: 1925 C. 1034; Pramatha Nath Choudhuri v. Krishna Chandra Bhattacharjee, 84 I.C. 420: 1924 C. 1067.

39. Soney Lall Jha v. Darbdeo Narain

Singh, 14 P. 461: 155 I.C. 470: 1935 P. 167 (F.B.); Hari Ahir v. Sri Sangat Chacha, 152 I.C. 829: 1934 P. 617.

40. Nanakchand v. Mian Muhammad Shahbaz Khan, 1936 L. 114; Daulat Shah v. Bishan Das, 1934 L. 750; Ghulam Mohammad v. Kalim Ullah, 109 I.C. 728: 1928 L. 428; Lajpat Rai v. Faiz Ahmad, 8 L. 651: 103 I.C. 889: 1927 L. 448.

41. Shrinivasdas Bavri v. Meherbai, 41 B. 300: 44 I.A. 36: 39 I.C. 627: 1916 P.C. 5.

42. See Rani Srimati v. Khagendra Narayan Singh, 31 C. 871: 31 I.A. 127 (P.C.).

43. Karupanna Konar v. Rangaswami Konar, 107 I.C. 293: 1928 M. 105.

44. Reajaddi Sarkar v. Ganga Charan Bhattachariya, 53 I.C. 863; Ambar Ali v. Lutfe Ali, 45 C. 159: 41 I.C. 116; Abdullah v. Kunja Behari Lal, 12 I.C. 149: 15 C.L.J. 7.

45. In re Daddapaneni Narayanappa, 8 I.C. 268; see also observations in Karupanna Konar v. Rangaswami Konar, 107 I.C. 293: 1928 M. 105.

a statement against interest, and if the argument that, since it extinguishes or restricts the rights of the transferor, therefore, it is a statement against the transferor's interest, be taken to its logical conclusions, it would make all recitals of relevant facts in deeds of transfer evidence between persons who were no parties to them. The English rule of statements in disparagement of title is not applicable to such cases, as that rule applies to statements made by an occupier of property with reference to the property occupied, and *ex hypothesi* the executant of a deed of transfer is not in possession of the adjoining property to which the statement relates. Further, it is submitted that such cases are governed more by the rule in *Crease v. Barrett*⁴⁶ than by the rule in *Higham v. Ridgway*.⁴⁷ This latter English case forms the foundation of the series of cases which are in favour of the admissibility of such recitals, but, as remarked by Mukerji, J., this case was taken by the Indian Legislature only as illustrative of what is meant by the expression "ordinary course of business" as used in clause (2) of section 32, and it is extremely doubtful if the Legislature at all intended to incorporate it in its entirety in section 32 of the Act.⁴⁸ Of course, where the executants of the document containing a recital of boundaries are not shown to be dead or unavailable, there is no question of the application of section 32 and the recital would be entirely inadmissible.⁴⁹ See notes to section 13.

Meaning of a statement being "against interest".—The statement must be to the immediate prejudice of the declarant.⁵⁰ It must be *prima facie* against the declarant's interest, that is to say, the natural meaning of the statement standing alone must be against the interest of the person who made it.¹ If *prima facie* against interest, it will not affect its admissibility, though it may its value, to prove by other evidence that it was really in favour of the declarant.² Further, the statement must have been against interest at the time it was made; it is not enough that it might possibly turn out to be so afterwards.³ The extent of the interest affected is immaterial for purposes of admissibility of a statement, though it may be material for determining its value;⁴ but the statement must have been

46. 1 C.M. & R. 919. In this case the question being whether a certain spot was within the waste of a manor, a declaration by the deceased lord that "he was entitled to the waste up to a certain point (which did not include the locus in quo) but no further was held inadmissible on the ground (i) that the lord was not in possession of the locus; and (ii) the statement was not against his proprietary interest, because, though disclaiming as to one part, he affirmed as to the other;" see Phipson, Ev., 6th Ed., 284.

47. (1808) 10 East 109.

48. *Ambica Charan Kundu v. Kumud Mohan Chaudhury*, 110 I.C. 521: 1928 C. 893.

49. *Abdul Rahim Kazi v. Jonabali Sikdar*, 68 I.C. 329: 1923 C. 299.

50. *Ramanathan Chetty v. Murugappa Chetty*, 33 I.C. 969.

1. *Taylor v. Witham*, (1876) 3 Ch. D. 605; *Ramanathan Chetty v. Murugappa Chetty*, 33 I.C. 969; *Markhu Mahto v. Saharai Mahto*, 1940 P. 16; but see *Woodroffe, Ev.*, 9th Ed. 343, where it has been remarked that "where the fact that the declaration is against the declarant's interest does not clearly appear from the statement itself, it is permissible to give independent evidence to supply this want".

2. *Re Adams*, (1922) P. 240; *Taylor v. Witham* (1876) 3 Ch. D. 605.

3. *Ex parte Edwards*, (1885) 14 Q.B. D. 415; *Ramanathan Chetty v. Murugappa Chetty*, 33 I.C. 969; *Hollaram v. Dwarkadas*, 1939 S. 145; *Arjun Sukla v. Jujesthi Sukla*, 1954 Orissa 52; see *Mahmood Khan v. E.*, 1942 S. 106.

4. *Phipson, Ev.*, 6th Ed., 278; *Woodroffe, Ev.*, 9th Ed., 343; see *Shvamanand Das Mohapatra v. Rama Kanta Das Mohapatra*, 32 C. 6; *Hollaram v. Dwarkadas*, 1939 S. 145.

to the knowledge of the declarant, contrary to his interest.⁵ In determining whether a statement is against the interest of the person making it, we must look to the statement itself and not to the nature of the transaction in the course of which the statement was made.⁶

Personal knowledge on the part of the declarant of the fact stated necessary.—Declarations against interest have been admitted, though the declarant had no personal knowledge of the facts and received them merely on hearsay;⁷ but in a comparatively recent English case, in which no reference was made to the earlier cases cited in the preceding footnote, Lord Justice Hamilton has held it to be necessary for the reception in evidence of a statement against interest not only that the statement must have been, to the knowledge of the declarant, contrary to his interest, but also that the declarant must have had personal knowledge of the facts stated,⁸ and the same view of this matter seems to have been taken in India.⁹

Collateral and incidental facts mentioned in the statement are admissible.—When a statement is against the interest of the declarant, it becomes admissible in its entirety¹⁰ and as to every fact contained in it. The statement is evidence not only of the specific fact against interest, but of all collateral or incidental facts contained in the statement, which are not foreign to the part actually against interest.¹² Declarations are evidence not only of the precise fact against interest, but of all connected facts, though not against interest, which are necessary to explain or are expressly referred to by the declaration.¹³ The statement of a deceased person, which is against the pecuniary or proprietary interest of that person, or which would expose him to a criminal prosecution or a suit for damages, is admissible not only against that person, but also against other persons mentioned or referred to therein, provided that the reference to such third persons is not foreign to that portion of the statement which is against the interest of the declarant.¹⁴ In the leading English case on the subject, *Higham v. Ridgway*¹⁵ an entry made by a deceased man midwife in his own books of the payment of his charges for attending a confinement was treated as evidence of the date of the child's birth, a fact which was merely collateral to the actual fact against interest, viz., the admission of the payment of charges. A statement by a deceased person in a

5. *Lloyd v. Powell, etc.* (1913) 2 K. B. 130; *Ramanathan Chetty v. Murugappa Chetty*, 33 I.C. 969; on the question whether the declarant must be conscious that the statement would expose him to prosecution, see *Nga Te v. E.*, 20 I.C. 990; 14 Cr. L.J. 510.

6. *Markhu Mahto v. Saharai Mahto*, 184 I.C. 246; 1940 P. 16.

7. *Percival v. Nanson*, (1851) 7 Ex. 1; *Grease v. Barrett*, 1 C.M. & R. 919; *Taylor* § 669.

8. *Lloyd v. Powell, etc., Co.*, (1913) 2 K.B. 130 (C.A.).

9. *Ramanathan Chetty v. Murugappa Chetty*, 33 I.C. 969; *Savitri Devi v. Ram Ran Bijoy Prasad Singh*, 1950 P.C. 1: 63 M.L.W. 45: 54 C. W.N. 233; 76 I.A. 255; 1950 A.L.

J. 134: 1950, 1 M.L.J. 163.

10. *Sita Ram Singh v. Khub Lal Singh*, 5 P. 168: 94 I.C. 13: 1926 P. 255; see *Leelanund Singh v. Lakhputtee Thakoorain*, 22 W.R. 231.

11. *Ambar Ali v. Lutfe Ali*, 45 C. 159: 41 I.C. 116.

12. *Reg. v. Overseer of Birmingham*, (1861) 1 B. & S. 763; *Mohammad v. E.*, 89 I.C. 252: 1926 L. 54: 26 Cr. L.J. 1308; *Ningawa v. Bharmappa*, 23 B. 63.

13. *Phipson's Manual of Ev.*, 4th Ed., 121; *Steph. Dig.*, Art 28; *Sisir Kumar Saha v. Jogneswar Saha*, 42 C.W.N. 359.

14. *Mohammad v. E.*, 89 I.C. 252: 1926 L. 54: 26 Cr. L.J. 1308.

15. (1808) 10 East 109.

mortgage-deed that he is indebted in a certain sum of money which is a charge on his land being a statement against his pecuniary and proprietary interest, a recital in the mortgage-deed that the adjoining land belongs to a particular person is admissible to prove that person's ownership of the adjoining land.¹⁶ The statements of a particular person that he is separated from a joint family, of which he was a co-parcener, and that he has no further interest in the joint property or claim to any assets left by his father, would be statements made against the interest of such person, and, after such person is dead, they would be relevant. The assertion that there was separation not only in respect of himself but between all the co-parceners would be admissible as a connected matter and an integral part of the same statement. It is not merely the precise fact which is against interest that is admissible but all matters that are involved in it and knit up with the statement.¹⁷

Statement exposing its author to a prosecution or a suit for damages.

—According to English law, the interest involved must be pecuniary or proprietary; no other, even though of a penal kind, will suffice.¹⁸ The Act, however, departs from the English rule by making admissible statements which, if true, would expose their author to a criminal prosecution or to a suit for damages, and the Indian rule is more consistent with the principle on which such hearsay is admitted.

Whole statement admissible.—The principle that the whole of the statement against interest, including parts which are not against interest, is admissible, is applicable to a statement which is admitted on the ground that it would expose its author to a criminal prosecution or to a suit for damages.¹⁹

If a person has witnessed a murder, it is his duty under section 44, Cr. P. Code, to give information of such murder, forthwith to the nearest Magistrate or Police Officer and the omission to give such information is punishable under section 202 of the Indian Penal Code. Therefore the statement of a deceased person, who witnessed a murder but did not inform the authorities of it, that he witnessed the accused committing the murder is admissible under this clause.²⁰ A statement made by the mate of a vessel admitting responsibility for a collision is admissible under this clause.²¹ A statement made by a person to a village headman that he set fire to a heap in the village exposes him to a criminal prosecution and is, therefore, admissible if the person who made it has disappeared.²² In a divorce suit filed in India by the husband on the ground of adultery, a letter written to him by the co-respondent who lives in England admitting adultery with the respondent is admissible in evidence under section 32(3), Evidence Act, as the admission of adultery would expose him to a criminal prosecution.²³

16. *Ningawa v. Bharmappa*, 23 B. 63. This view has not been accepted as correct in some cases. See notes to this clause under the heading "recitals of boundaries in deeds, etc".

17. *Bhagwati Prasad Sah v. Dulhin Rameshwari Kuer*, 1952 S.C. 72; 1952 S.C.J. 115.

18. *Phipson, Ev.*, 6th Ed., 278; *Sussex Peerage Case*, 11 C. & F. 108.

19. *Mohammad v. E.*, 89 I.C. 252; 1926 L. 54: 26 Cr. L.J. 1308.

20. *Ajodhi v. E.*, 56 I.C. 582: 21 Cr. L.J. 486.

21. *Asiatic Steam Navigation Co. v. Bengal Coal Co.*, 35 C. 751.

22. *S. Paul De Silva v. The Korossa (Ceylon) Rubber Co., Ltd.*, 1919 P.C. 231.

23. *Cockman v. Cockman*, 56 A. 570: 150 I.C. 445: 1934 A. 618.

Statements by accomplices.—The statement of a deceased accomplice to the police detailing the incidents of the crime and incriminating himself and the accused is admissible against the latter, provided the reference to the accused is not foreign to that part of the statement which is against the interest of the deceased declarant.²⁴ Similarly, the confession of an accused person who is dead, implicating himself and an accomplice in a crime, is admissible notwithstanding the provisions of section 30, illustration (b).²⁵ The statement of a deceased convict incriminating himself but exonerating the accused from guilt, is admissible in favour of the accused.²⁶

Admissibility of confessional statements made to the police by a deceased accomplice doubtful: sections 32 (3.), 25, 26 and 30, Evidence Act, and section 162, Cr. P. Code.—It will be noticed that a statement made by a deceased accomplice in the course of police investigation, incriminating himself and others, has been held admissible in some cases.²⁷ If the maker of the statement had been alive, there is no doubt that such statement would have been inadmissible, under sections 25 and 26 of the Act, against its author, and it is difficult to see on what principle an incriminating statement, which would have been inadmissible even against its maker if he had been alive, can be held admissible against others.²⁸ Further, a statement of this kind is inadmissible under section 30, as, *ex hypothesi*, its maker is not being jointly tried with those against whom the statement is sought to be proved, and section 30 being the only exception recognized to the general rule that a confession is evidence against its maker and not against others, it is doubtful whether the special rule enacted in section 30 can be read subject to the general provisions of section 32(3).²⁹ Lastly, section 162 of the Criminal Procedure Code, as amended in 1923, makes statements made in the course of police investigation inadmissible; and the admission of such statements clearly contravenes this provision of the Code.³⁰ The admission, under this clause, of statements made by an accomplice to the police after the police have started investigating the case against him also contravenes the rule laid down by the Bombay High Court³¹ that this clause does not apply to statements which are made after prosecution has been actually started.

Relief that the statement would expose its maker to prosecution is necessary.—Where the declarant was a police spy who had joined the dacoits to assist the police but was mortally wounded, and who made a statement before his death implicating himself and others, the statement was held inadmissible on the ground that, at the time he made the statement, he could not have the slightest idea that he would be prosecuted.³²

24. *Mohammad v. E.*, 89 I.C. 252: 1926 L. 54: 26 Cr. L.J. 1308.

25. *Nag Poyin v. E.*, 5 Cr. L.J. 300; see also Cr. A. 450 of 1937. *Sardha Ram v. Crown (Lahore)* and Cr. A. 659 of 1939. *Labhu Ram v. Crown (Lahore)* decided by Ram Lal and Din Mohammad, J.J., on Oct. 3, 1939.

26. *Sheikh Shafi v. E.*, 124 I.C. 459: 1930 N. 259.

27. *Mohammad v. E.*, 89 I.C. 252: 1926 L. 54: 26 Cr. L.J. 1308; *Ajodhi v. E.*, 56 I.C. 582: 21 Cr. L.J. 486.

28. See *Keratali v. E.*, 61 C. 967: 150 I.C. 980: 1934 C. 616: 35 Cr. L.J. 1178.

29. See *Keratali v. E.*, 61 C. 967: 150 I.C. 980: 1934 C. 616: 35 Cr. L.J. 1178; *Dengo Kadero v. E.*, 1938 S. 94; held contra *Nga Poyin v. E.*, 5 Cr. L.J. 300.

30. See *Narayana Swami v. E.*, 1939 P.C. 47.

31. *E. v. Keshav Narayan Manolkar*, 25 Bom. L.R. 248, followed in *Janu v. E.*, I.L.R. 1946 Kar. 79.

32. *Nga Te v. E.*, 20 I.C. 990: 14 Cr. L.J. 510; as to whether the statement should, to its maker's knowledge, be against interest, see *Ramanathan Chetty v. Murugappa Chetty*, 33 I.C. 969.

Statements made after prosecution has commenced or after the risk of prosecution has passed away are inadmissible.—The principle underlying section 32(3) is that when a person makes a statement rendering him liable to criminal prosecution, the statement is likely to be a true statement. Therefore a statement made by a person against whom there is already in existence evidence which would lead to his prosecution and conviction, is inadmissible under this section.³³ This clause of section 32 does not apply to a statement made by an accused person after the charge has been preferred against him. Therefore, where one of the accused persons made a statement before the committing Magistrate implicating himself and the other accused persons and then died, the statement was held inadmissible against the latter, as it was made after the former had incurred the liability for prosecution.³⁴ A confession made by a deceased accomplice or conspirator after he had rendered himself liable to criminal prosecution is not admissible under section 32(3).³⁵ “The words ‘would have exposed him’ require some observation. They will no doubt be construed to mean ‘would have exposed him at the time that the statement was made.’ It could never have been intended that a statement made after the risk had passed away, as for example, after a suit for damages had become barred by limitation or after the expiry of the two years within which prosecution for offences under the Indian Christian Marriages Act must be instituted,³⁶ should be admitted merely because, if made some months or weeks earlier, it would have exposed its maker to a criminal prosecution or to a suit for damages. This view has since been supported by the Calcutta High Court,³⁷ and is generally adopted by modern authorities.”³⁸

Statements falling within section 32(3) are admissible under section 21 in the declarant's lifetime.—A statement which amounts to an admission and falls within the purview of section 32(3) is admissible even during the declarant's lifetime under section 21(1). Thus, where a landlord purchased his tenant's holding in execution of a decree against him, and the landlord stated that the area held by the tenant was 20 bighas, it was held that the statement was against the proprietary interest of the landlord and was, therefore, admissible in favour of the landlord under section 32(3) and section 21.³⁹

CLAUSE (4): DECLARATIONS AS TO PUBLIC AND GENERAL RIGHTS

Principle and reason of the rule.—In proof of public or general rights and customs or matters of public or general interest statements made by deceased persons of competent knowledge as to the existence of such rights, etc., and as to the general reputation thereof in the neighbourhood, if made *ante litem motam*, are admissible. Such statements are

33. *Achhailal v. E.*, I.L.R. 25 P. 347: 1947 P. 90.

34. *E. v. Keshav Narayan Manolkar*, 25 Bom. L.R. 248; but see *Sheikh Shafi v. E.*, 124 I.C. 459: 1930 N. 259, where a statement made after trial and conviction and just before execution of death sentence was, with some degree of doubt, held admissible; *Mohammad v. E.*, 89 I.C. 252: 1926 L. 54: 26 Cr. L.J. 1308, where statement made

by the deceased after he had been charged by the police was admitted.

35. *Janu v. E.*, I.L.R. 1946 Kar. 79; *Kunja-Lal Ghosh v. E.*, 38 C.W. N. 1015.

36. See section 76, Act XV of 1872.

37. See *Nichols v. Asphar*, 24 C. 216.

38. *Field, Ev.*, 8th Ed., 184.

39. *Manik Biswas v. Jagdindra Nath Roy Bahadur*, 24 I.C. 283.

known as declarations as to public and general rights.⁴⁰ Such declarations are admissible, even if they be no more than evidence of reputation or hearsay.⁴¹ The grounds on which this species of evidence is received are thus stated by Taylor: "The origin of the rights claimed is usually so ancient and the rights themselves are of so undefined and general a character, that direct proof of their existence and nature can seldom be obtained and ought not to be required; that in matters in which the community are interested, all persons must be deemed conversant; that as common rights are naturally talked of in public, and as the nature of such rights much lessens the probability, if it does not exclude the possibility, of individual bias, what is dropped in conversation respecting them may be presumed to be true; that the general interest which belongs to the subject would lead to immediate contradiction from others, if the statements advanced were false; that reputation can hardly exist without the concurrence of many parties unconnected with each other, who are all more or less interested in investigating the subject; that such concurrence furnishes strong presumptive evidence of truth; and that it is this prevailing current of assertion which is resorted to as evidence, for to this every member of the community is supposed to be privy, and to contribute his share."⁴² The reason of this exception, in favour of hearsay evidence is partly necessity, since without such evidence ancient rights could rarely be established; and partly that the public nature of the right minimizes the risk of mis-statement.⁴³ This subsection allows evidence of opinion in respect of any matter of public or general interest, the test being whether the deceased person expressing the opinion was likely to have knowledge of the fact stated.⁴⁴

Conditions of admissibility.—The conditions of admissibility of a statement under this clause are: (i) the statement must be in the form of an expression of opinion of a person who cannot be called as a witness for any of the reasons mentioned in the section, (ii) the opinion must relate to the existence or non-existence of a public right or custom, or a matter of public or general interest, (iii) the opinion must be of a person who would have been likely to be aware of the existence of the right, custom or matter to which the opinion relates, and (iv) the opinion must have been expressed before any controversy as to the existence of that right, custom or matter arose.

Statement must relate to the existence of the right or custom and not to particular facts evidencing the existence of that right or custom.—What this clause makes relevant is a statement giving the opinion of a person as to the existence of a public right or custom, or a matter of public or general interest. Therefore, the statement must relate directly to the existence of the right itself and not to particular facts which may support or negative it, as the latter, not being equally notorious, are liable to be misrepresented and misunderstood,⁴⁵ and may have been connected

40. *Weeks v. Sparke*, (1813) 1 M. & S. 679; *Cockle's Cases and Statutes*, 4th Ed., 221, 222; *Ram Parshad v. Gurdwara Prabandhak Committee*, 12 L. 497: 135 I.C. 657: 1931 L. 161.

41. *Busoid v. Newaz Ahmed Khan*, 119 I.C. 116: 1929 C. 533.

42. Taylor, § 608.

43. *Busoid v. Newaz Ahmed Khan*,

119 I.C. 116: 1929 C. 533.

44. *Ram Parshad v. Gurdwara Prabandhak Committee*, 12 L. 497: 135 I.C. 657: 1931 L. 161.

45. *R. v. Bliss*, (1837) 45 R.R. 757; *Cockle's Cases and Statutes*, 4th Ed., 227; *Phipson, Ev.*, 6th Ed., 296; Taylor, § 617; *Ram Parshad v. Gurdwara Prabandhak Committee*, 12 L. 497: 135 I.C. 657: 1931 L. 161.

with other facts by which, if known, their effect might be limited or explained.⁴⁶ Thus, where the question was whether a road was public or private, a statement made by a deceased resident that he had planted a tree to mark the boundary of the road was held inadmissible, on the ground that the statement did not describe the road as public or private but related to a particular fact.⁴⁷ Although hearsay evidence is good evidence of reputation in matters of public interest, it is not good evidence of particular facts.⁴⁸ A statement of a deceased person that in his family or caste such and such a custom obtain is admissible under this clause, but a statement by such person that the custom was followed on a particular occasion is inadmissible.⁴⁹

Public right versus private right; statement asserting the existence of a private right admissible to prove the non-existence of a public right.—Declarations are receivable, which not only directly negative a general right, but which indirectly do so, e.g., by setting up an inconsistent private claim;⁵⁰ or by omitting all mention of it where mention might reasonably be expected.¹ No distinction can be drawn between the evidence of reputation to establish, and that to disparage, a public right. Thus, where the question was whether certain forest tracts were State property or whether they were included within the limits of the private property of the plaintiff **Zamindar**, documents which furnished proof of inclusion of the said tracts within the limits of the **Zamindari** were held admissible.² But in a Bombay case³ it has been remarked that this clause is inapplicable to a document which purports to deal with the rights of a private individual as against the public, and in which the interest of the individual forms the subject-matter of the statement.

Statement must give the declarant's opinion and must not be a mere repetition of hearsay: sections 32(4), 48 and 49.—In a case⁴ decided under the provisions of section 49, the Privy Council has held that a mere repetition of hearsay, as distinguished from an independent opinion based on hearsay, is inadmissible. Though section 32(4) only applies to opinions of deceased persons, the principle of this Privy Council decision should be equally applicable to statements admitted under this clause of the section, inasmuch as section 49 and section 32(4) both deal with the relevancy of opinion, the former with the relevancy of the opinion of living persons, the latter with the relevancy of the opinion of deceased persons, and should, therefore, be governed by the same principle. A statement that is given in evidence under this clause must give the independent opinion of the deceased declarant as to the existence of the right or custom in question, though the opinion may be based on nothing but reputation, which is another name for hearsay. But if the statement is merely a re-

46. Taylor, § 617.

47. R. v. Bliss, (1837) 45 R.R. 757.

48. R. v. Berger, (1894) 1 Q.B. 823.

49. Mst. Parbati v. Rani Chandrepal, 8 O.C. 94.

50. Drinkwater v. Porter, 7 C. & P. 181.

1. Edgar v. Fisheries Comms., 23 L.T. N.S. 723; Taylor, § 620; Phipson, Ev., 6th Ed., 296.

2. Shivasubarmanna v. Secretary of State, 9 M. 285.

3. Heiniger v. Droz, 25 B. 433.

4. Garurdhwaia Prosad v. Superundhwaja Prasad, 23 A. 37: 27 I.A. 238 (P.C.), followed in Pratap Chandra Deo Dhabal Deb v. Jagdish Chandra Deo Dhabal Deb, 82 I.C. 886: 1925 C. 116, referred to in Mst. Parbati v. Rani Chandrepal, 8 O.C. 94; Prabhu Narain Singh v. Jitendra Mohan Singh, 1948 O. 307: 22 Luck. 522.

production of hearsay, and not an independent opinion based on hearsay the statement will be inadmissible.⁵ The grounds of the opinion of a deceased person as to the existence of a custom even if stated to a witness, cannot, as such, be proved under this clause of the section.⁶

Public right or custom, or matter of public or general interest.—“Public rights” are those that are common to all members of the State, e.g., rights of highway and ferry, or of fishery in tidal rivers. “General rights” are those affecting any considerable section of the community, e.g., questions as to the boundaries of a parish or manor.⁷ The Act does not anywhere define the expression “public right,” but the expression “general right” has been defined as including rights common to any considerable class of persons.⁸ This clause of the section does not expressly refer to general rights, but they seem to have been included in “matters of public or general interest”. The terms “public” and “general” are sometimes used as synonyms, meaning merely what concerns a multitude of persons.⁹ The term “interest” in the expression “matters of public or general interest” does not mean that which is interesting from gratifying curiosity, or a love of information or amusement, but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected.¹⁰ Where the statement does not relate to a public right or custom, or a matter of public or general interest, it is inadmissible.¹¹ The clause does not justify the admission of a statement, where the question is whether a person was, at the time of his death, joint with, or separate from, others; or whether he survived another.¹² But a statement in a deed that a certain place is a masjid is a statement on a matter of general interest and, therefore, admissible under this clause.¹³ The question of the limits of a particular revenue mahal is not a matter of public right or public or general interest.¹⁴ Recitals as to boundaries of plots in any document do not constitute the opinion of the executant of the deed on any matter. Therefore such recitals are not admissible.¹⁵

Statement is admissible whether the right or custom be a fact in issue or merely relevant.—Where the question was whether a widow could adopt without the express authority of her husband, a statement to the effect that she could do so was held inadmissible, on the ground that the alleged custom was a fact in issue in the case and not merely relevant, and that this section only applies to statements of relevant facts and not to statements of facts in issue.¹⁶ This Bombay decision has, however, been disapproved in a later case, where it has been remarked that facts in issue are included in relevant facts, and that this section is applicable whether

5. See *Mst. Amina Khatun v. Khalil-urrahman Khan*, 8 Luck. 445: 1933 O. 246; *Pratap Chandra Deo Dhabal Deb v. Jagdish Chandra Dhabal Deb*, 82 I.C. 886: 1925 C. 116.

6. *Mst. Parbati v. Rani Chandrepal*, 8 O.C. 94.

7. Phipson, Ev., 6th Ed.; 294.

8. Section 48.

9. Taylor, § 609.

10. *R. v. Bedfordshire*, (1855) 4 E. & B. 535; Woodroffe, Ev., 9th Ed., 325.

11. *Motilal v. Baba Baldeo Dass*, 1952

V.P. 36.

12. *Mst. Parbati v. Rani Chandrepal*, 8 O.C. 94.

13. *Busoid v. Newaz Ahmed Khan*, 119 I.C. 116: 1929 C. 533.

14. *Maharaja Sir Kesho Prasad Singh v. Bahuria Mst. Bhagjogna Kuer*, 16 P. 258: 1937 P.C. 69: 167 I.C. 329.

15. *Ram Saran v. Narayan Chandra*, 1954 C. 125.

16. *Patel Vandravan Jekisan v. Patel Manilal Chunilal*, 15 B. 565.

the statement relates to a fact in issue or to a relevant fact.¹⁷ It is submitted that the language of different clauses of the section and the illustrations appended to the section clearly indicate that statements relating to facts in issue are within the section; though, at the same time, it must be observed that the whole scheme of the Act shows that the expression "facts in issue" is used in contradistinction to the expression "relevant facts".¹⁸

Declarations as to private rights are inadmissible.—Declarations by deceased persons as to private rights are inadmissible, since these are not likely to be so commonly or correctly known, and are more likely to be misrepresented.¹⁹ This clause is inapplicable to a document which purports to deal with the rights of a private individual as against the public and in which the interest of the individual forms the subject-matter of the statement.²⁰ But in a Madras case²¹ a statement asserting the right of an individual as against the State was held admissible, on the ground that no distinction can be drawn between the evidence of reputation to establish, and that to disparage, a public right, and this Madras case is in accordance with the English rule.²² The public or general right, or matter of public or general interest, which is sought to be established by reputation, or by declarations of deceased persons, must be one that is common to all the persons interested, e.g., a right common to all the inhabitants of a particular manor. A right is not within the rule simply because it is enjoyed by many persons in their own individual capacities, such as a right of common enjoyed by several persons in the same manor in their individual capacities, or an aggregate of private rights.²³

Statement must be by a person likely to be aware of the existence of the right, custom or matter in question; competency of the declarant; entries in wajibularz.—The distinction between a public right and a general right has already been noticed.²⁴ In English law, the distinction between "public rights" and "general rights" is material; inasmuch as whereas, in the case of "public rights," all being concerned may generally be presumed competent, so that the absence of peculiar means of knowledge goes, strictly speaking, to weight and not admissibility, in the case of "general rights," the competency of the declarant has to be proved.²⁵ The distinction between "public rights" and "general rights" is not, however, of much importance under the Act as, whether the right be "public" or "general," the "competency" of the declarant has to be established. A declarant is considered "competent" when, by residence, duty or other connection, he was so situated as to the place in question that it may be concluded he had both the means and the motive for giving a true account of the matter.²⁶ Where a custom was sought to be established by the entries in certain *wajibularaiz* which were certified by a person belonging to the family affected by the custom, and which appeared by internal evidence

17. *Raghubhushana Tirthaswami v. Vidiavaridhi Tirthaswami*, 34 I.C. 875, per Abdul Rahim, J.

18. See the definition of these two expressions in section 3 and the chapter on Relevancy.

19. *Dunraven v. Llewellyn*, 15 Q.B. 791; *Phipson, Ev.*, 6th Ed., 294.

20. *Heiniger v. Droz*, 25 B. 433.

21. *Sivasubramanya v. Secretary of State*, 9 M. 285.

22. See *Drinkwater v. Porter*, 7 C. &

P. 181.

23. *Dunraven v. Llewellyn*, 15 Q.B. 791; *Cockle's Cases and Statutes*, 4th Ed., 224, 225.

24. See notes under the heading "public right or custom, or matter of public or general interest".

25. *Phipson, Ev.*, 6th Ed., 295.

26. *Newcastle v. Broxtowe*, (1832) 4 B. & Ad. 273; *Cockle's Cases and Statutes*, 4th Ed., 228.

to have been prepared on the information furnished by the **Zamindars** of the village, the entries were held relevant, under this clause, to prove the existence of the custom.²⁷ On a question of custom, a witness having special means of knowledge may state his own opinion, or he may state what he heard from deceased persons having special means of knowledge as to the existence of that custom.²⁸

Statement must have been made before the commencement of the controversy; lis mota; section 32(4) and section 49.—The statement must, in order to prevent bias, have been made *ante litem motam*, i.e., before the commencement of any controversy, and not merely before the commencement of any suit involving the same subject-matter. Statements made after the commencement of the situation from which the controversy springs are admissible, if made before any dispute has in fact arisen; whilst those made after a dispute has arisen are inadmissible, although the dispute was unknown to the declarant, or was fraudulently commenced with a view of excluding the statements, or involved different parties or related to different property or claims.²⁹ Statements relating to a custom are inadmissible, if they were made after a controversy as to that custom had arisen.³⁰ A statement that the testator had no power to make the will, contained in an objection petition filed in a probate case, is not admissible in another proceeding, to show that one of the members of the family had admitted the existence of prohibition on testamentary disposition in the family as the controversy about the right of making a will is to be considered as having commenced before the objection petition was filed.³¹ Section 32 is a special section providing in what cases statements of deceased persons would be admissible. Such statements have not the sanction of oath and the person making them cannot be subjected to cross-examination. It is necessary, therefore, that the statements should not be made under bias, i.e., after a controversy has arisen. Clause 4 of this section accordingly provides that statements of deceased persons are admissible only if they were made before the controversy had arisen. Therefore, it would not be reasonable to hold that those very statements, though made after the controversy had arisen and consequently inadmissible under section 32(4), may become admissible under section 49, as the latter section, taken with section 60, is applicable only to the opinion of a living witness actually examined in Court.³²

CLAUSES (5) AND (6) : DECLARATIONS AS TO PEDIGREE

Principle and reason.—These two clauses reproduce with some modifications the English law on the subject of the admissibility of declaration as to pedigree. The grounds of reception of such declarations are: (i) death; (ii) necessity, such inquiries generally involving remote facts of family history known to but few, and incapable of direct proof; and (iii) the peculiar means of knowledge and absence of interest to mis-

27. *Baij Nath Singh v. Bahadur Singh*, 91 I.C. 583: 1926 O. 101: 12 C.L.J. 571.

28. *Ikbāl Narain v. Rajendra Narain*, 48 I.C. 767.

29. Phipson, Ev., 6th Ed., 295.

30. *Ekradeshwar Singh v. Javeshwari Bahuasīn*, 42 C. 582: 41 I.A. 275: 25 I.C. 417: 1914 P.C. 76; *Mst. Amina*

Khatun v. Khalilurrahman Khan, 8 Luck. 445: 1933 O. 246.

31. *Pratap Chandra Dev Dhabal Deb v. Jagdish Chandra Dev Dhabal Deb*, 82 I.C. 886: 1925 C. 116.

32. *Pratap Chandra Dev Dhaval Deb v. Jagdish Chandra Dev Dhaval Deb*, 82 I.C. 886: 1925 C. 116.

represent of the declarants—members of the family having the greatest interest in seeking the best opportunities of obtaining, and the least motive for falsifying, information on such subjects.³³

Scope of Section 32(5).—The Supreme Court of India has laid down the four essential conditions for the application of section 32(5) as follows: in the case of **Dolgovinda Paricha v. Nimai** that (1) the statements verbal or written, of relevant facts must have been made by person who is dead etc. (2) They must relate to the existence of any relation by blood, marriage or adoption. (3) The person making the statement must have special means of knowledge as to the relationship in question, and (4) the statement must have been made before the question in dispute was raised. The declarations may take the form of oral statement, family correspondence, the recitals in deeds, wills, pleadings, depositions, school registers, etc. It is not necessary that the statement should be relevant to the matter in issue in respect of which it was made and it is immaterial whether it was made in a judicial proceeding or otherwise. Statement by several persons some of whom are dead and some alive are admissible as a statement of the deceased person under section 32(5). In **Paricha's** case the pedigree was held admissible though one of the persons was dead and two were alive.³⁴

Points of distinction between clause (5) and clause (6).—The following are the points of distinction between the two clauses:—

(i) The declaration under clause (5) may relate to the existence of relationship between persons, alive or deceased, whereas clause (6) applies to declarations of relationship between deceased persons only.³⁵ (ii) Clause (5) requires the declaration to proceed from a person having special means of knowledge, but clause (6) does not expressly impose this restriction, presumably because no stranger can be a party to the preparation of documents of the kind mentioned in the clause. In the case of documents made relevant by the sixth clause, there is an implied assumption that the statements contained in them were made by persons having special means of knowledge. (iii) Under clause (5), the declaration may be written or verbal, and may have been made on any occasion, **ante litem motam**, and in any manner, but clause (6) requires not only that the statement should be a written one, but also that it should be contained in some document of the kind mentioned therein.

Both clauses, however, require that the statement should have been made before any controversy as to the relationship sought to be proved by the statement arose.

Scope of Section 32(5) and (6).—Both sub-sections (5) and (6) of section 32 of the Indian Evidence Act declare that in order to be admissible the statement relied on must be made **ante litem motam** by persons who are dead, i.e., before the commencement of any controversy actual or legal, upon the same point. The words 'before the question in issue was raised' do not necessarily mean before it was raised in the particular litigation in which such a statement is sought to be adduced in evidence.³⁶

33. Phipson, Ev., 6th Ed., 307; Taylor, § 635.

34. A.I.R. 1959 S.C. 914.

35. **Ramnarain Kallia v. Monee Bibee**,

9 C. 613.

36. **Kalidindi Venkata Subbaraju and others v. Chintalapati Subbaraju and others**, (1968) (2) S.C.J. 513.

Form of the declaration.—The following are the forms which hearsay upon matters of pedigree usually takes:—Oral statements; family correspondence; recitals or descriptions in deeds; settlements and wills; plaints; petitions; pedigree tables; horoscopes; depositions; affidavits; and school registers. It is not necessary that the statement should be relevant to the matter in issue in respect of which it was made, and it is immaterial whether it was made in a judicial proceeding or otherwise.³⁷ As has been noticed already, clause (6), unlike clause (5), requires the statement to be made only in documents of the kind mentioned therein, i.e., wills, deeds, family pedigrees, tombstones, family portraits or other things on which such statements are usually made.

Invalidity of a document does not ordinarily affect the admissibility of the statement.—A statement in a written agreement is admissible as evidence of pedigree, even though the agreement has been set aside as against a party.³⁸ Section 17(b) of the Registration Act does not render a passage in a will inadmissible in evidence, if its words do not purport or operate to extinguish an interest but state only past facts. Such a statement, if proved, may also be admissible as evidence of pedigree under section 32, clause (6).³⁹ It is no objection to the relevancy of a statement of relationship contained in a will that the will is an unprobated will.⁴⁰

Declaration must be shown to have been made by a person who is dead or who cannot be produced as a witness.—The party tendering in evidence a declaration under this section has to show that the person who made the declaration is dead, or has become incapable of giving evidence, or cannot be called as a witness. If, therefore, the declarant is alive,⁴¹ or has not been proved to be dead or incapable of giving evidence,⁴² the declaration will be inadmissible. A report as to relationship of parties made about 70 years ago was held admissible on the presumption that the maker of the report must have died.⁴³

Statement by several persons some of whom are dead.—Where a statement is made by several persons, each person must be taken to have made the statement for himself; and, if one or more of such persons be dead, while the rest are alive, the statement will still be admissible as the statement of a "deceased persons".⁴⁴

To be admissible under clause 5, the declaration must be of a person having special means of knowledge.—Under the English law, declarations

37. *Biro v. Atma Ram*, 64 I.A. 92: 1937 P.C. 101; 167 I.C. 346.

38. *Timma v. Damma*, 10 M. 362.

38. *Chamanbu Javje Mahomedali Bohori v. Multanchand Shivram*, 20 B. 562.

40. *Hitnarain Singh v. Rambarai Rai*, 7 P. 733: 1928 P. 459; but see *Maheshwar Panda v. Sundar Narain Pattanaik*, 33 I.C. 342: 22 C. L.J. 551.

41. *Munna Lal v. Kameshri Dat*, 114 I.C. 801: 1929 O. 113; *Hara Kumar Dey v. Jogendra Krishna Roy*, 71 I.C. 336: 1924 C. 526; *Sumitra Kuer v. Ram Kair Ghowbey*, 57 I.

C. 561: 1921 P. 61; *Paevathi v. Thirumalai*, 10 M. 334.

42. *Surjan Singh v. Sardar Singh*, 23 A. 72: 27 I.A. 183 (P.C.); *Mehr Dad v. Muhammad Ali Shah*, 84 I. C. 927: 1925 L. 63; *Ramnarain Kallia v. Monee Bibee*, 9 C. 613; See *Mohan Lal v. Tulsan*, 109 I.C. 774: 1928 L. 824.

43. *Pritam Singh v. Tilok Singh*, 1954 Pepsu 14.

44. *Bindeshwari Singh v. Ram Raj Singh*, 1939 A. 61; *Chandra Nath Roy v. Nilmadhab Bhattacharjee*, 26 C. 236.

are receivable only from persons connected by blood with the person or family whose pedigree is in question, or from the husbands or wives of persons so connected; and must not proceed from mere relatives of such husbands or wives; nor from friends, servants, or neighbours of the family, nor from the family solicitor.⁴⁵ Unlike the English rule, the Act makes relevant declarations from all persons having special means of knowing the relationship. Thus, declarations from family members, e.g., the father,⁴⁶ adoptive grandfather,⁴⁷ adoptive mother,⁴⁸ adoptive parent's sister,⁴⁹ servants,⁵⁰ family priests,¹ family bards,² *bhats*,³ *pandas*,⁴ and *mirasis*,⁵ have been received. The declaration may come from a member,⁶ relative, servant of dependant⁷ of the family. Special knowledge required by section 32(5) should be presumed in the case of members of the family.⁸ Therefore, in the case of a statement as to relationship of certain persons with the family by an old member of the family it is not necessary for the member to depose to any particular source of knowledge. His special knowledge may be presumed.⁹ A *qanungo* of a *taluqdar* is presumed to have special means of knowing the relationship between the different branches of the *taluqdar's* family;¹⁰ and a *mazumdar* has special means of knowing the relationship among the members of the *zamindar's* family.¹¹ But where a declaration proceeded from a *mukhtar* employed by certain members of a family but not otherwise connected with the family, and the declaration was based on information derived from his being instructed as a *mukhtar*, the Privy Council held, it to be inadmissible.¹² The fact that a man is the general agent of another does not by itself justify the conclusion that he has special means of knowledge with regard to the mem-

45. Phipson, Ev., 7th Ed. 298.

46. *Latafat Hussain v. Onkar Mal*, 1935 O. 41.

47. *Chendikamba v. Vishwanathamayya*, (1939) 1 M.L.J. 227: 1939 M. 446.

48. *Naima Khatun v. Basant Singh*, 149 I.C. 781: 1934 A. 406 (F.B.).

49. *Ma Nyun Vin v. Ma Kyin*, 1941 R. 276.

50. *Mohima Chunder Chund v. Mothoora Nath Ghose*, 9 W.R. 151.

1. *Acharaj Ram v. Ganesh Das*, 151 I.C. 622: 1934 Pesh. 78; *Balak Ram High School, Panipat v. Nanu Mal*, 11 L. 503: 128 I.C. 532: 1930 L. 579; *Shamlal Singh v. Radha Bibee*, 4 C.L.R. 173.

2. *Anandi v. Nand Lal*, 46 A. 665: 83 I.C. 618: 1924 A. 575; *Mohansing Umed Ramol v. Dalpatsing Hanbaji*, 46 B. 753: 67 I.C. 235: 1922 B. 51; *Lahanu v. Motiram*, 63 I.C. 968: 1921 N. 49; but see *Ghulam Mohammad v. Miraj Din*, 40 P.L.R. 162.

3. *Kartic Chandra Chakravarty v. Gossain Protap Chandra Gir*, 66 I.C. 894: 1921 C. 482; *Hazarilal v. Har Govind*, 48 I.C. 375.

4. *Amritsaria v. Prabh Dial*, 89 I.C. 989: 1926 L. 157; *Bura v. Nanak*, 84 I.C. 912: 1925 L. 281; *Collector of Farrukhabad v. Gajraj Singh*,

15 I.C. 625.

5. *Abdul Ghafur v. Hussain Bibi*, 12 L. 336: 58 I.A. 188: 130 I.C. 612: 1931 P.C. 45; *Ratni v. Harwant Singh*, 1949 E.P. 158: 50 P.L.R. 249.

6. *Khadam Hussain v. Mohamma Hussain*, 1941 L. 73; *Abdul Gaur v. Hussain Bibi*, 12 L. 336: 58 I.A. 188: 130 I.C. 612: 1931 P.C. 45; *Mohammad Azim Khan v. Raja Saiyid Mohammad Saadat Ali Khan*, 1931 O. 177.

7. *Garuradhwaja Prasad v. Superundhwaja Prasad*, 23 A. 37: 27 I.A. 238 (P.C.); *Ramakrishna Pillai v. Tirunarayana Pillai*, 55 M. 40: 139 I.C. 684: 1932 M. 198; *Balbhaddar Singh v. Sripal Singh*, 48 I.C. 308.

8. *Prabhakar Vithoba Gourkhede v. Sarubai*, 1943 N. 253: I.L.R. 1943 N. 779: 208 I.C. 211.

9. *Mohammad Asad Ali Khan v. Sadiq Ali Khan*, 1943 O. 91: 18 Luck. 346: 205 I.C. 433.

10. *Lal Harihar Partap Bakhsh Singh v. Bisheshwar Bakhsh Singh*, 3 Luck. 326: 109 I.C. 422: 1928 O. 307.

11. *Navaneetha Krishna Thevar v. Ramasami Pandia Thalavar*, 40 M. 871: 39 I.C. 263.

12. *Sangram Singh v. Rajan Bahi*, 12 C. 219: 12 I.A. 183 (P.C.).

bers of his employer's family. But where there is evidence to show that his father who had also similarly acted as himself had been on terms of friendship with the family for a long period and the agent's family was living close to the master's house, it can be said that he has special means of knowledge of the relationship between different members of the family.¹³ The burden of proving that the declarant had special means of knowledge is on the party who wishes to give the declaration in evidence,¹⁴ but the question whether the declarant had such means is for the Court to determine.¹⁵ A declaration by a deceased person as to his own parentage,¹⁶ or date of birth,¹⁷ or his own relationship with another person,¹⁸ or as to his having been adopted by another when four years of age,¹⁹ or as to the names of his relatives,²⁰ is admissible. But section 32 is inapplicable to a statement by an adopted son that he was told by his natural father that his adoption was without the consent of the husband of the adoptive mother.²¹ A statement made by a deceased person that there was a marriage between him and a certain woman is admissible in evidence to prove the legitimacy of his children. The doctrines of Moham-edan law cannot be held to exclude such evidence and the Evidence Act applies to the case.²² Where the declarant is not shown to have had special means of knowing the relationship, the declaration will be inadmissible. To render a family pedigree admissible, it is necessary to show that the person filing it had special means of knowledge of the relationship mentioned in the pedigree.²³ But where a pedigree represents a joint statement by several persons, it is sufficient that one or more of them had special means of knowledge.²⁴ An inam statement is inadmissible in evidence for proving relationship, where the person making the statement was in no way related to the family concerned, and had no special means of knowledge on the subject.²⁵ A report by a **Girdawar Qanungo** appointed to enquire into the relationship of the parties is admissible because the enquiry held by him afforded him special means of knowledge on the question of relationship.²⁶

If a pedigree has been admitted in evidence in the trial Court without objection, its admissibility cannot be called in question in appeal on the ground that the person who prepared the pedigree is not proved to have had special means of knowledge.²⁷

Statement in a register of baptism, school register, pocket book, or

- | | |
|---|--|
| 13. Pratap Kumar v. Raj Bahadur Singh, 1943 O. 316: 209 I.C. 310. | 139: 144 I.C. 433: 1933 A. 329. |
| 14. Section 104; see also Subbiah Mudaliar v. Gopala Mudaliar, 1936 M. 808. | 23. Bhimma Singh v. Sunder, 69 I.C. 421: 1922 O. 218. |
| 15. Ramkrishna Aiyar v. Chinna Vengammal, 26 I.C. 110. | 24. Lahanu v. Motiram, 63 I.C. 968. 1921 N. 49. |
| 16. Santu v. Tara, 85 I.C. 407: 1925 O. 537. | 25. Kandalam Krishnamacharulu v. Sathulari Vijayasarithi, 88 I.C. 646: 1925 M. 823. |
| 17. Ramanathan Chetty v. Murugappa Chetty, 33 I.C. 969. | 26. Pritam Singh v. Tilok Singh, 1954 Pepsu 14. |
| 18. Mullangi Venkatarangam Chetty v. Venkatasubbammah, 19 I.C. 740. | 27. Bindeshwari Singh v. Ram Raj Singh, 1939 A. 61. It is submitted that if there is no evidence to show that the person who prepared the pedigree had special means of knowledge, the pedigree must be rejected as the objection in such a case is to the relevancy of the statement. |
| 19. Gulab Thakur v. Fadali, 68 I.C. 566: 1921 N. 153. | |
| 20. Wahid Bux Bhutto v. E., 120 I.C. 81: 1929 S. 250: 30 Cr. L.J. 1121. | |
| 21. Prem Jagat Kuer v. Harihar Baksh Singh, 1946 O. 163. | |
| 22. Zamin Ali v. Azizunnissa, 55 A. | |

petition for guardianship, whether admissible?—An entry as to the age of a person, contained in a register of baptism, is inadmissible, if there is nothing to show by whom the statement entered therein was made and whether the person making the statement had special means of knowledge.²⁸ But an entry in a school register as to the age of a scholar, which is made on information supplied by the deceased father of the boy, is admissible in evidence under clause (5) of section 32.²⁹ There is a presumption that when a boy is admitted into a school, he was accompanied by some close relative of his who must have been aware of his age.³⁰ A statement as to the date of birth of a person in a guardianship petition is admissible under this section if the person making the statement is dead and had special means of knowledge;³¹ but not if the person making the application for guardianship is alive and has not been examined as a witness.³² An entry by the father in his pocket book regarding the birth of his various sons is relevant under section 32(5) after the death of the father and it can be proved by persons acquainted with his handwriting.³³

Relationship by blood, marriage or adoption.—Relationship by fosterage is not relationship by blood, marriage or adoption.³⁴ The word “marriage” includes a marriage by *muta* in the Shia law.³⁵ The relation between a *mahant* and a *chela* is a relation by adoption.³⁶ The declaration may relate to the declarant’s own relationship with another person,³⁷ or to his own age.³⁸ Recitals in sale deeds and mortgage deeds by an adopted son, or in a will in which he described himself as an adopted son, are admissible under section 32, clauses (5) and (6).³⁹ A statement in a will that a beneficiary under it was the adopted son of the testator is admissible, provided the statement was not made by the testator in his own interest, or in view of contemplated litigation.⁴⁰ A statement by a *sapinda* as to the circumstances in which he was adopted is a statement as to the existence of his relationship by adoption, and is, therefore, admissible

28. 2 N.L.R. 34.
29. *Latafat Husain v. Onkar Mal*, 1935 O. 41; *Indian Cotton Co., Ltd. v. Raghunath Hari Deshpande*, 130 I. C. 598: 1931 B. 178; *Munna Lal v. Kameshri Dat.* 114 I.C. 801: 1929 O. 113.
30. *Kala Ram S. Bhag Singh v. Fazal Bari Khan*, 1941 Pesh. 38: 194 I.C. 824.
31. *Mukti Pada Dawn v. Aklema Khatun*, 1950 C. 533; *Prohlad Chandra Chowdhury v. Ramsaran Chowdhury*, 81 I.C. 630: 1924 C. 420; *Hara Kumar De v. Jogendra Krishna Ray*, 71 I.C. 336: 1924 C. 526; see also *Abdul Ghafur v. Hussain Bibi*, 12 I. 336: 58 I.A. 188: 130 I.C. 612: 1931 P.C. 45.
32. *Kishorilal v. Adhar Chandra*, 1942 C. 438; *Hara Kumar v. Jogendra Krishna Ray*, 71 I.C. 336: 1924 C. 526; *Sarat Chandra Maiti v. Bibhati Debi*, 66 I.C. 433: 1921 C. 584; as to recital of date of birth in a guardianship certificate, see *Monindra Mohan Roy Mukhopadhyaya v. Ram Krishna Sadhukhan*, 28 I. C. 595: 21 C.L.J. 621.
33. *Kala Ram S. Bhag Singh v. Fazal Bari Khan*, 1941 Pesh. 38: 194 I.C. 824.
34. *Suraiya Qadr v. Qudsia Begam*, 24 I.C. 643.
35. 2 O.C. 115; see also *Baqar Ali Khan v. Anjuman Ara Begam*, 25 A. 236: 30 I.A. 94 (P.C.).
36. *Achyutananda Das v. Jagannath Das*, 27 I.C. 739: 21 C.L.J. 96; see also *Ram Parshad v. Gurdwara Prabandhak Committee*, 12 L. 497: 135 I.C. 657: 1931 L. 161.
37. *Mullangi Venkatarangam Chetty v. Venkatasubbammah*, 19 I.C. 740; *Pannalal v. Chaman Prakash*, 225 I.C. 8.
38. *Oriental Government Security Life Assurance Co., Ltd. v. Narasinha Chari*, 25 M. 183.
39. *Mullangi Venkatarangam Chetty v. Venkatasubbammah*, 19 I.C. 740.
40. *Chandreswar Prosad Narain Singh v. Bisheshwar Pratap Narain Singh*, 5 P. 777: 101 I.C. 289: 1927 P. 61.

under clause (5)⁴¹ A statement in a panchait's report mentioning a person as having been adopted by another person is admissible on the question of adoption.⁴² Statements of deceased persons relating to incidents bearing more or less directly on the fact or otherwise of an adoption and its validity are admissible.⁴³ In a case in which the question was whether the plaintiff was the adopted son of a dismissed Sirdar, documents coming from official sources recording statements as to adoption made before any dispute had arisen to the officials in the locality not merely by the plaintiff himself in the presence of others but also by other members and by the dismissed Sirdar himself were treated by the Privy Council as carrying the greatest possible weight though it is not stated under what section these statements were admissible.⁴⁴ A statement written and signed by the officiating priest at a marriage that the essential ceremonies of the marriage were duly performed is not a statement as to relationship and cannot, therefore, be tendered in evidence in proof of the marriage.⁴⁵

Where the question at issue is whether a person died issueless or left a son, the statement that he died issueless amounts to a statement relating to the existence of a relationship by blood, because the question whether he left a son involves the question whether there is any blood relationship between him and the person who claims to be his son. "The existence of any relationship," includes the non-existence of that relationship. If a statement relating to the existence of such relationship is admissible, any statement which implies that there is no existence of such relationship between two persons should also be admissible.⁴⁶ The number of heirs who are entitled to succeed to the property of a deceased Hindu is very large. Hence statements made by a deceased Hindu in his lifetime that in his family there was no person alive, whether near or remote, cannot be construed as meaning that the deceased left no heir to his property.⁴⁷

A statement in a deed of adoption by a deceased widow is admissible under section 32(5).⁴⁸

Declaration admissible on such matters as age, seniority, minority, date of birth, legitimacy, and names of relations; but not on questions which are not strictly questions of relationship.—The rule of English law is particularly strict in the matter of evidence regarding a pedigree, and the admission of hearsay evidence in pedigree cases is confined to the proof of pedigree and does not apply to proof of the facts which constitute a pedigree, such as death, birth and marriage, when they have to be proved for other purposes. But in India the rule enacted by section 32, clauses (5) and (6), is not so strict, and declarations of deceased competent declarants have been admitted on questions of age, birth, death, mar-

41. *Danakoti Ammal v. Balasundara Mudaliar*, 36 M. 19: 18 I.C. 989.

42. *Ajab Singh v. Nanabhau*, 25 B. 1: 28 I.A. 48 (P.C.).

43. *Haridas Chatterjee v. Manmatha Nath*, 1936 C. 1: 160 I.C. 332.

44. *Arjuno Naiko v. Modonomohono Naiko*, 1940 P.C. 153.

45. *Jadavkumar Liladhar v. Pushpaba*

Mainthianee, 1944 B. 29: 211 I.C. 315.

46. *Suba Raut v. Dindeyal Choudhary*, 1941 P. 205.

47. *Secretary of State v. Kanhaiya Lal*, 1941 O. 337: 16 Luck. 551: 192 I.C. 131.

48. *Punjab Rao v. Shesh Rao*, 62 Bom. L.R. 726.

riage, etc.⁴⁹ A statement relating to the existence of any relationship is admissible to prove the facts mentioned in the statement.⁵⁰ Since a question as to the existence of any relationship also includes the question as to the commencement of that relationship,¹ declarations of deceased competent declarants have been held to be admissible to prove a person's date of birth,² and, consequently, his age³, minority or majority,⁴ or the order in which the members of the family were born.⁵ Such declarations have also been admitted to prove legitimacy or illegitimacy,⁶ parentage,⁷ names of relations,⁸ or the date of death of a member of the family, as death implies the termination of a relationship just as birth implies its commencement.⁹ A statement whether an ancestor of the person making the statement was related to him as an elder uncle or a younger uncle, or an elder brother or a younger brother or an elder son or a younger son of a certain person is a statement as to relationship. Since the dates of birth of the ancestors could be admissible on the ground that they indicated commencement of the relationship with the person making the statement, the statement as to relative seniority is also equally admissible on the same ground showing as it does that the relationship with one commenced earlier than relationship with the other. The question of seniority thus falls

49. *Naima Khatun v. Basant Singh*, 149 I.C. 781: 1934 A. 406 (F.B.); *Mahadeo Prasad v. Ghulam Mohammad*, 1947 A. 161: 1946 A.L.J. 411: I.L.R. 1946 A. 649.

50. *Dhanmu v. Ram Chunder Ghose*, 24 C. 265.

1. *Amardayal Singh v. Har Pershad Sahu*, 58 I.C. 72; *Annamalai Chetti v. Annamalai Chetti*, 52 I.C. 456; *Monindra Mohan Roy Mukhopadhyaya v. Ram Krishna Sadhukhan*, 28 I.C. 595: 21 C.L.J. 621, 2 O.C. 758; *Sheo Lal Singh v. Goor Narain*, 7 I.C. 218; *Oriental Government Security Life Assurance Co., Ltd. v. Narasima Chari*, 25 M. 183; *Ram Chandra Dutt v. Jogeswar Narain Deo*, 20 C. 758; but see *Satis Chunder Mukhopadhyaya v. Mohendro Lal Pathuk*, 17 C. 849; *Bipin Behary Daw v. Sreedam Chunder Dey*, 13 C. 42; and observations in *Amardayal Singh v. Har Pershad Sahu*, 58 I.C. 72 and *Monindra Mohan Roy Mukhopadhyaya v. Ram Krishna Sadhukhan*, 28 I.C. 595: 21 C.L.J. 621.

2. *Abdul Subhan Khan v. Nusrat Ali Khan*, 12 Luck. 606: 1937 O. 170: 165 I.C. 523; *Naima Khatun v. Basant Singh*, 149 I.C. 781: 1934 A. 406 (F.B.); *Munna Lal v. Kameshri Dat*, 114 I.C. 801: 1929 O. 113; *Prohlad Chandra Chowdhury v. Ramasaran Chowdhury*, 81 I.C. 680: 1924 C. 420; *Hara Kumar Dey v. Jogendra Krishna Ray*, 71 I.C. 336: 1924 C. 526; *Ramanathan Chetty v. Murugappa Chetty*, 33 I.C. 969; *Monindra Mohan Roy*

Mukhopadhyaya v. Ram Krishna Sadhukhan, 28 I.C. 595: 21 C.L.J. 621; *Achyutananda Das v. Jagannath Das*, 27 I.C. 739: 21 C.L.J. 96; *Bappu Raju v. Kondu Raja*, 9 I.C. 324; 2 O.C. 758.

3. *Ch. Jadunath Singh v. Th. Bishe-shar Singh*, 1939 O. 17; *Naima Khatun v. Basant Singh*, 149 I.C. 781: 1934 A. 406 (F.B.); *Kuram Krishnama Chariar v. Veervalli Krishnama Chariar*, 38 M. 166: 19 I.C. 452; *Oriental Government Security Life Assurance Co., Ltd. v. Narasimha Chari*, 25 M. 183.

4. *Mahomed Syedol Ariffin v. Yeoh Ooi Gurk*, 43 I.A. 256: 39 I.C. 401: 1916 P.C. 242; *Chuah Hooi Gnoh Neoh v. Khaw Sim Bee*, 31 I.C. 637: 19 C.W.N. 787: 1915 P.C. 45.

5. *Dhanmull v. Ram Chunder Ghose*, 24 C. 265; see *Krishnapal Singh v. Raj Kuar*, 104 I.C. 299: 1927 O. 278.

6. *Parbati v. Maharaj Singh*, 10 I.C. 188; *Gopalasami Chetti v. Arunachelam Chetti*, 27 M. 32; *Baqar Ali Khan v. Anjuman Ara Begam*, 25 A. 236: 30 I.A. 94 (P.C.).

7. *Santu v. Tara*, 85 I.C. 407: 1925 O. 537.

8. *Wahid Bux Butto v. E.*, 120 I.C. 81: 1929 S. 250: 30 Cr. L.J. 1121.

9. *Sheo Lal Singh v. Goor Narain*, 7 I.C. 218; see *Sayeruddin Akond v. Samiruddin Akond*, 72 I.C. 985: 1923 C. 378; *Lachman Lal Pathak v. Kamakshya Narayan Singh*, 131 I.C. 788: 1931 P. 224; *Naima Khatun v. Basant Singh*, 149 I.C. 781: 1934 A. 406 (F.B.).

within the ambit of the word relationship and evidence relating to it is admissible under section 32(5).¹⁰ But, where the question is one which is entirely unconnected with the question of relationship, e.g., mode of succession in a family,¹¹ or the status of an accused person as a European British subject,¹² the declaration is not admissible. A declaration is inadmissible on the question whether a person was living, earning, and holding property separately,¹³ or whether he survived another person, or whether he was joint or separate at the time of his death.¹⁴ The relationship between a mahant and a chela is a relationship by adoption within the meaning of this clause.¹⁵

Construction of Section 32(5)—Statement as regards age—admissible.—A statement as regards age is tantamount to a statement as to the existence of relationship. Therefore, the statement made by a person in his will that he was 19 years of age at the time of its execution is admissible and can be relied upon as establishing that the person concerned was a major and was competent to make the said will.¹⁶

Horoscopes or birthday-books.—The Privy Council decision in *Chuah Hooi v. Khaw Sim Bee*,¹⁷ is an authority in favour of the admissibility of a horoscope or birthday-book.¹⁸ The circumstances under which and the purposes for which a horoscope may become admissible in evidence are as follows:—

(i) If the horoscope represents the statement of a person who is alive at the time it is given in evidence, it is not relevant either under clause (5) or clause (6) of section 32; but it may be used, under section 159 or section 160 of the Act, by the person whose statement it represents to refresh his memory if he is examined as a witness in the case and if he had himself written it or read it soon after it had been written;¹⁹ or it may be used to corroborate or to contradict the testimony of such person, under section 157 or section 155.²⁰

(ii) If the person whose statement it embodies is dead or cannot be called as a witness for any of the reasons mentioned in section 32, the horoscope may be admissible under clause (6) of

10. *Kanhaiya Bux Singh v. Mst. Ram Dei Kuer*, 1944 O. 162.

11. *Patinharkuru Vallaban Chattan Rajah Avergal v. Raman Varma*, 24 I.C. 519.

12. *Thomas v. E.*, 53 C. 746; 98 I.C. 248; 1926 C. 1203; 27 Cr. L.J. 1304.

13. *Gokaldas Jethanand v. Chandibai*, 10 I.C. 967.

14. *Parbati v. Rani Chandrepal*, 8 O. C. 94.

15. *Achyutananda Das v. Jaggannath Das*, 27 I.C. 739; 21 C.L.J. 96; see also *Ram Parshad v. Gurdwara Prabandhak Committee*, 12 L. 497; 135 I.C. 657; 1931 L. 161.

16. *Kalidindi Venkata Subharaju and others v. Chintalapti Subharaju*

and others, 1968 (2) S.C.J. 513.

17. *Chuah Hooi Gnoh Neoh v. Khaw Sim Bee*, 31 I.C. 637; 19 C.W.N. 787; 1915 P.C. 45.

18. *Ramanathan Chetty v. Murugappa Chetty*, 33 I.C. 969.

19. *Las Baba v. Government of Mysore*, 12 Mys. L.J. 133; *Ambika Prasad v. Lal Bahadur*, 83 I.C. 840; 1924 O. 353; *Shankergir Guru Motigir v. Chinnuji*, 71 I.C. 140; 1923 N. 164; *Banwari Lal v. Mahesh*, 41 A. 63; 45 I.A. 284; 49 I.C. 504; 1918 P.C. 118; *Har Bahadur Lal v. Chand Raj Bahadur*, 48 I.C. 400.

20. *Har Bahadur Lal v. Chand Raj Bahadur*, 48 I.C. 400.

this section, if it is given in evidence to prove any relationship or the commencement of any relationship between persons deceased.²¹ If, however, it is tendered in evidence to prove the relationship of persons who are alive or to prove the relationship of a deceased person with a living person, it will be admissible under clause (6).²²

- (iii) A horoscope is always admissible under clause (5) to prove relationship between persons deceased or alive, provided the person whose statement it embodies is shown to be dead and to have possessed special means of knowing the relationship; and since it has been held that the question of the existence of a relationship covers also the question of the commencement of relationship,²³ horoscopes prepared by deceased persons, or representing the statements of deceased persons, who had special means of knowing the relationship, have been admitted under clause (5), not only to prove the existence of relationship, but also such matters as age, minority, date of birth, etc.²⁴

21. In *Ramnarain Kallia v. Monee Bibee*, 9 C. 613, the horoscope was held inadmissible under clause (6) on the ground that it was given in evidence to prove relationship between a living person and a deceased person, and because it had not been shown that its writer was dead or could not be found or had become incapable of giving evidence. If, therefore, the horoscope had been given in evidence to prove any relationship or commencement of any relationship between persons deceased and its writer had been shown to be dead, the horoscope would have been admissible under clause (6). In *Satis Chunder Mukhopadhyaya v. Muhendro Lal Pathuk*, 17 C. 849, the ground of inadmissibility of the horoscope under clause (6) was that the person who made it was not shown to have had any special means of knowledge, and because the question to be decided in the case, viz., the date of birth of a person, was not a question of a relationship by blood, marriage or adoption. Both these grounds of decision in 17 C. 849 are open to objection; because, firstly, clause (6), unlike clause (5), does not require that the person making the statement must have had special means of knowledge, see *Lahanu v. Motiram*, 63 I.C. 968; and, secondly, the question as to a person's date of birth is a question as to the commencement of his relationship with other persons and, as such, is within clause (5) as well

as within clause (6), see *Ram Chandra Dutt v. Jogeswar Narain Deo*, 20 C. 758; *Dhanmull v. Ram Chunder Ghose*, 24 C. 265; *Oriental Government Security Life Insurance Co., Ltd. v. Narasimha Chari*, 25 M. 183; *Monindra Mohan Roy Mukhopadhyaya v. Ram Krishna Sadhukhan*, 28 I.C. 595; *Annamalai Chetti v. Annamalai Chetti*, 52 I.C. 456. In *Ramanathan Chetty v. Murugappa Chetty*, 33 I.C. 969, clause (6) was held inapplicable to a horoscope because it was given in evidence to prove the date of birth of a living person and clause (6) is obviously inapplicable where the relationship to be proved is between a living person and a deceased person.

22. *Ramnarain Kallia v. Monee Bibi*, 9 C. 613.

23. *Las Baba v. Govt. of Mysore*, 12 Mys. L.J. 133; *Annamalai Chetti v. Annamalai Chetti*, 52 I.C. 456; *Monindra Mohan Roy Mukhopadhyaya v. Ram Krishna Sadhukhan*, 28 I.C. 695; *Oriental Government Security Life Assurance Co., Ltd. v. Narasimha Chari*, 25 M. 183; *Dhanumull v. Ram Chunder Ghose*, 24 C. 265; *Ram Chandra Dutt v. Jogeswar Narain Deo*, 20 C. 758.

24. *Noni Gopal Ganguly v. Calcutta Improvement Trust*, 1938 C. 43; *Nirmalanalini Devi v. Kamalabala Dassi*, 142 I.C. 36; 1933 C. 51; *Ganganand Singh v. Rameshwar Singh Bahadur*, 6 P. 388; 102 I.C. 449; 1927 P. 271; *Amardayal Singh*

- (iv) A horoscope may be admissible as an admission under section 17 and 18 of the Act, or as a "public record" under section 35 if it has been on the record of a revenue office from a period *ante litem motam*.²⁵

A horoscope which is produced by a stranger, and when the person who made it has not been called as a witness, is inadmissible in evidence.²⁶ In the matter of proof of minority a horoscope is not of very great evidentiary value but the birth register is.²⁷

Admissibility of pedigrees under clause (6).—Pedigrees are written statements of relationship and, as such, relevant under clause (5) and clause (6) of the section, on proof of the fact that they represent statements made *ante litem motam* by persons who are dead or who cannot be called as witnesses for any of the reasons mentioned in the section. It should, however, be noted that clause (6), unlike clause (5), does not expressly require that the statement must have been made by a person who had special means of knowing the relationship. Therefore, if a document is held to be a "family pedigree" within the meaning of clause (6), and it represents the statement of a deceased person, it is unnecessary to show that the person whose statement is embodied in the "family pedigree" had special means of knowing the relationship.²⁸ In *Kalka Prasad v. Mathura Prasad*,²⁹ where certain documents purporting to be pedigrees prepared on a previous occasion were put in evidence but neither party relied on clause (6) for their admissibility, the Privy Council observed as follows: "They are not ancient family records handed down from generation to generation and added to as a member of the family dies or is born, but documents drawn up on a particular occasion for a specific purpose by members of the family, and must accordingly be treated as mere declarations made by the persons who respectively drew them up or adopted them". These remarks of the Privy Council have been understood in a case³⁰ as laying down the distinction between a "family pedigree" of clause (6) and a mere declaration of relationship admissible under clause (5); but in more recent cases these remarks of the Privy Council have been interpreted as merely indicating the highest and best type of a "family pedigree" and not as laying down an exhaustive definition of it.³¹ In a later case the Privy Council itself has recognized the difficulty of preparing pedigrees in a country like India.³² Consequently, the term "family pedigree" has been interpreted to mean a "pedigree of the family,"³³

v. Har Pershad Sahu, 58 I.C. 72; Annamalai Chetti v. Annamalai Chetti, 52 I.C. 456; Ramanathan Chetty v. Murugappa Chetty, 33 I.C. 969; Bidyadhari Dassee v. Pran Gopal Kissen Mookerjee, 5 C.W. N. cxlviii.
25. Raja Goundan v. Raja Goundan, 17 M. 134.
26. Kuram Krishnama Chariar v. Veeravelli Krishnama Chariar, 38 M. 166; 19 I.C. 452.
27. Bharat Basi v. Gopi Nath, 1941 A. 385; 197 I.C. 866; 1941 A.L.J. 560.
28. Lahanu v. Motiram, 63 I.C. 968; 1921 N. 49; see notes under the heading "points of distinction bet-

ween clause (5) and clause (6)".
29. Kalka Prasad v. Mathura Prasad, 30 A. 510; 35 I.A. 166 (P.C.).
30. Mathura Prasad Singh v. Bhulan Singh, 14 I.C. 339.
31. Jang Bahadur Singh v. Arjun Singh, 3 Luck. 256; 110 I.C. 466; 1928 O. 125; Namdeo v. Ganoba, 86 I.C. 847; 1925 N. 271.
32. Doddawa Kom Bennepgowda v. Bennapagowada Bin Tenkangowada, 1925 P.C. 199; 86 I.C. 326; see also Kanhaiya Bux Singh v. Mst. Ram Dei Kuer, 1944 O. 162.
33. Jang Bahadur Singh v. Arjun Singh, 3 Luck. 256; 110 I.C. 466; 1928 O. 125.

kept by a member of the family or by another person on its behalf, e.g., a family bard or a family chronicler;³⁴ and clause (6) of the section has been applied to a pedigree prepared by a deceased member of the family³⁵ about 32 years before the suit,³⁶ to one written by a living *gomashta* of a deceased family bard at the latter's instance,³⁷ to one kept in the family of a family chronicler for three generations,³⁸ to one received by a member of the family from his father,³⁹ or grandfather,⁴⁰ and to one written by the deceased *mukhtar* of a member of the family and produced in Court by the widow of that member of the family.⁴¹ The words "family pedigree" should not be understood according to the standard adopted by courts of law in England in regard to English pedigrees. The people of India and the people of England differ considerably in their habits of thought. The form and appearance of a family pedigree in England, itself contains the marks of its authenticity. In India unless the pedigree in a document is shown to be a statement of some member of the family or maintained in the family as a family pedigree, it cannot be said to be admissible in evidence.⁴²

Admissibility of pedigrees under clause (5).—A pedigree which is not strictly a "family pedigree" within the meaning of clause (6) is admissible also under clause (5) on proof of the facts, that it represents the statement of a person who is dead or who cannot be called as a witness for any of the reasons mentioned in the section, that the person whose statement it represents had special means of knowing the relationship mentioned in the pedigree, and that the statement was made before the relationship sought to be proved by it came into controversy.⁴³

Pedigrees filed in settlement proceedings are admissible under section 22 (5) and section 35; presumption of genuineness under section 90 in respect of 30 years old pedigrees.—If a settlement pedigree is one that is signed by the members of the family, it will be admissible under section 32, clause (5), as the statement of a deceased person who had special means of knowing the relationship. It must, however, be proved that the statement in the pedigree was made at a time when there was no dispute

34. *Anandi v. Nand Lal*, 46 A. 665: 83 I.C. 618: 1924 A. 575; *Mohansing Umed Ramol v. Dalpatsing Hanbaji*, 46 B. 753: 67 I.C. 235: 1922 B. 51; *Lahanu v. Motiram*, 63 I.C. 968: 1921 N. 49; see also *Balak Ram High School, Panipat v. Nanu Mal*, 11 L. 503: 128 I.C. 532: 1930 L. 579.

35. *Abdul Ghafur v. Hussain Bibi*, 12 L. 336: 58 I.A. 188: 130 I.C. 612: 1931 P.C. 45; *Mohammad Azim Khan v. Saadat Ali Khan*, 1931 O. 177.

36. *Jagdeo v. Viyhoba*, 105 I.C. 81: 1928 N. 20.

37. *Anandi v. Nand Lal*, 46 A. 665: 83 I.C. 618: 1924 A. 575.

38. *Mohansing Umed Ramol v. Dalpatsing Hanbaji*, 46 B. 753: 67 I.C. 235: 1922 B. 51.

39. *Namdeo v. Gonaba*, 86 I.C. 847: 1925 N. 271.

40. *Jahangir v. Sheoraj Singh*, 37 A.

600: 36 I.C. 505 (2): 1915 A. 334.

41. *Jang Bahadur Singh v. Arjun Singh*, 3 Luck. 256: 110 I.C. 466: 1928 O. 125.

42. *Kanhaiya Bux Singh v. Ram Dei Kuer*, 1944 O. 162.

43. *Abdul Ghafur v. Hussain Bibi*, 12 L. 336: 58 I.A. 188: 130 I.C. 612: 1931 P.C. 45; *Sarfraz Khan v. Rajana*, 4 Luck. 39: 112 I.C. 834: 1929 O. 129; *Namdeo v. Ganoba*, 86 I.C. 847: 1925 N. 271; *Bhimma Singh v. Sunder*, 69 I.C. 421: 1922 O. 218; *Suraj Bali v. Tilok Chand*, 36 I.C. 66; *Bhabuti Singh v. Khetal Singh*, 21 I.C. 274; *Mathura Prasad Singh v. Bhulan Singh*, 14 I.C. 339; *Kashi Singh v. Balraj Singh*, 10 I.C. 199; *Mohammad Azim Khan v. Brijraj Singh*, 8 I.C. 728; *Kalka Prasad v. Mathura Parshad*, 30 A. 510: 35 I.A. 166: 1 I.C. 175 (P.C.).

as to the pedigree set up.⁴⁴ Even if a pedigree was not signed by the deceased members of the family, but its contents were adopted by them, and the entries in the *khewat* were recorded on its basis, it would be admissible under section 32, clause (5).⁴⁵ But where a pedigree is neither signed nor shown to have been filed by a deceased member of the family or a person who had special means of knowing the relationship, the pedigree will not be admissible under clause (5).⁴⁶ In the absence of evidence that he had special means of knowing the relationship, a pedigree filed by a distant member of the family in some previous proceedings does not make the pedigree admissible under section 32(5).⁴⁷ If the pedigree is prepared by the settlement officer himself after proper inquiry, and bears his signature, it can be admitted under section 35 of the Act as an entry in a public record stating a fact in issue and made by a public servant in the discharge of his official duties.⁴⁸ Section 35 is applicable to a pedigree prepared for the purposes of a settlement and which is the basis of the entries in the *khewat*.⁴⁹ In order to be relevant under section 35, it is not necessary that the settlement pedigree should have been signed by members of the family.⁵⁰ When a pedigree becomes relevant under section 35, a certified copy of it is admissible in evidence;¹ and if it is more than 30 years old, there is, under section 90, a presumption of genuineness² in favour of the pedigree,³ provided it purports to be in the handwriting of, or signed by, a particular person.⁴ A pedigree filed for the purposes of preparation of *khewat* more than 30 years previously, when there was no controversy in respect of it, is admissible under section 32(5) if the signatories to it are dead.⁵ A reference to the relationship of the donee with the husband of the donor contained in the final order of the Revenue Officer sanctioning mutation of the gift is admissible under section 32(5) of the Act.⁶

Pedigree must be shown to represent the statement of a competent declarant who is dead or who cannot be called as a witness.—In the case of old pedigrees it is generally impossible to give evidence as to who was

44. Sarfaraz Khan v. Rajana, 4 Luck. 39: 112 I.C. 834: 1929 O. 129; Suraj Bali v. Tilok Chand, 36 I.C. 66; Bhabuti Singh v. Khetal Singh, 21 I.C. 274.

45. Ram Din v. Kayesth Pathshala, Allahabad, 25 I.C. 823.

46. Bhimma Singh v. Sunder, 69 I.C. 421: 1922 O. 218; Mohammad Azim Khan v. Brijraj Singh, 8 I.C. 728; see also Kashi Singh v. Balraj Singh, 10 I.C. 199, where even a signed pedigree was held inadmissible.

47. Bhimma Singh v. Sunder, 69 I.C. 421: 1922 O. 218.

48. Sarfaraz Khan v. Rajana, 4 Luck. 39: 112 I.C. 834: 1929 O. 129; Sarju Dei v. Ram Harakh, 18 I.C. 250; see also Sardar Ali v. Ali Mohammad, 110 I.C. 710.

49. Baij Nath Singh v. Rajju Singh, 91 I.C. 583: 1926 O. 101.

50. Sarfaraz Khan v. Rajana, 4 Luck. 39: 112 I.C. 834: 1929 O. 129; Baij Nath Singh v. Rajju Singh, 91 I.C.

583: 1926 O. 101.

1. Sarju Dei v. Ram Harakh 18 I.C. 250.

2. Bhabuti Singh v. Khetal Singh, 21 I.C. 274; Sarju Dei v. Ram Harakh, 18 I.C. 250.

3. Presumption of genuineness does not apply to copies, see notes to section 90.

4. Section 90; Mathura Prashad Singh v. Bhulan Singh, 14 I.C. 339. In Jagdeo v. Vithoba, 105 I.C. 81: 1928 N. 20, presumption under section 90 was raised in respect of a pedigree which did not purport to be in the handwriting of any particular person but which was proved aliunde to have been written by a particular person; as to the inapplicability of section 90 to such pedigrees, see Mathura Prashad Singh v. Bhulan Singh, 14 I.C. 339.

5. Mahadeo Singh v. Suraj Bali Singh, 148 I.C. 1041: 1934 O. 210.

6. Fazal Haq v. Said Nur, 1948 L. 113.

the author of the statement contained in the pedigree,⁷ and the Allahabad High Court has held that it is not necessary to show who had made the statement mentioned in the pedigree.⁸ It is submitted, however, that though it is not necessary to show which particular person made the statement embodied in the pedigree, it is necessary to show that the pedigree represents the statement of a person who is dead or who cannot be called as a witness for any of the reasons mentioned in the section.⁹ Section 32, which makes the statements in the pedigree relevant, applies only when the statement was made by a person who is dead, or cannot be found, or has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which the Court considers unreasonable. Therefore, where there is nothing to show that the person whose statement is contained in the pedigree is dead or cannot be examined as a witness for any of the reasons mentioned in the section, the pedigree will not be admissible.¹⁰ Thus, where a pedigree was prepared in the family 13 years before the suit, and the bards were called to dictate it, and it was prepared from the history given by them, but the person assembling the bards and the bards themselves were not called as witnesses and no proof was given that these persons were dead or could not be produced as witnesses, the Privy Council held the pedigree to be inadmissible.¹¹ This ruling of the Privy Council is an authority for the proposition that the party tendering in evidence a pedigree is under a clear obligation to show that the pedigree represents the statement of a dead person or of a person who cannot be called as a witness. In a case the Lahore High Court held entries in the books of some **pandas** of Hardwar inadmissible where the person producing them could not say by whom they had been written.¹² Where a pedigree was copied from an old genealogical table, and it was not shown who was responsible for the old genealogical table, the pedigree was held inadmissible on the ground that it was not shown that the statement in the genealogical table was that of a deceased person who had special means of knowledge.¹³ Similarly, in another Lahore case where a witness had prepared the pedigree on the information of some other persons, the pedigree was held inadmissible for the reason that there was nothing to show that the person giving the information were dead or otherwise incapable of giving evidence.¹⁴ In the two Allahabad cases cited in the beginning of this paragraph,¹⁵ though it could not be said who had written the pedigrees or who had given the information contained in them, it had, in fact, been shown that the pedigrees had been in the possession of deceased members of the family, and therefore the statements made in them could rightly be taken as having been adopted by the deceased persons in whose possession they had been. A

7. *Jahangir v. Sheoraj Singh*, 37 A. 600: 30 I.C. 505; *Sitaji v. Bijendra Narain Choudhary*, 1951 Pat. 356: 28 Pat. 447.

8. *Anandi v. Nand Lal*, 46 A. 665: 83 I.C. 618: 1924 A. 575; *Jahangir v. Sheoraj Singh*, 37 A. 600: 30 I.C. 505.

9. *Mehr Dad v. Muhammad Ali Shah*, 84 I.C. 927: 1925 L. 63.

10. See *Chunna Kanwar v. Mukat Behari Lal*, 151 I.C. 338: 1934 A. 117, where this aspect of the rule is clearly brought out.

11. *Surjan Singh v. Sardar Singh*, 23 A. 72: 27 I.A. 183 (P.C.).

12. *Harnam Singh v. Mst. Bhagi*, 16 L. 1007: 1936 L. 261: 161 I.C. 916; see also *Hazura Singh v. Mohindar Singh*, 1937 L. 599; *Mst. Nanhi v. Badlu*, 1940 L. 245; *Kundan Lal v. Hukam Singh*, 1952 Punj. 115.

13. *Jhobali Rai v. Sakhi Rai*, 79 I.C. 335: 1923 P. 585.

14. *Mehr Dad v. Muhammad Ali Shah*, 84 I.C. 927: 1925 L. 63; see also *Hazura Singh v. Mohindar Singh*, 1937 L. 599.

15. *Anandi v. Nand Lal*, 46 A. 665: 83 I.C. 618: 1924 A. 575; *Jahangir v. Sheoraj Singh*, 37 A. 600: 30 I.C. 505.

person who is in possession of a document is presumed to adopt its contents, and a pedigree which has been shown to have been in the possession of a deceased member of the family may rightly be treated as the statement of a deceased person within the meaning of section 32. There must, however, be proof, direct or presumptive, of the statement in the pedigree having been adopted by a deceased member of the family.¹⁶ Statements of deceased members of the family may be proved not only by showing that they actually made the statements, but by showing that they acted upon them, or assented to them, or did anything that amounted to showing that they recognized them.¹⁷ The mere production of an ancient document from the family archives will not dispense with proof that it was made or recognized by some members of the family.¹⁸ Where a pedigree is said to have been prepared by a deceased member of the family, it must be shown either that he prepared it himself or that he had personal knowledge and belief as to its accuracy.¹⁹ Where some *bahis* containing statements as to pedigree were produced by a servant of the priest to whom the books belonged and he was unable to say when those entries were written and by whom, and he could not even swear to their being written by a priest of the family, it was held that the conditions precedent for applying clauses (5) and (6) of section 32 were not fulfilled.²⁰

Pedigrees more than 30 years old may be presumed to be genuine under section 90.—In the case of pedigrees which are more than 30 years old and which purport to be in the handwriting of, or signed by, a particular person, a presumption of genuineness may be raised under section 90 of the Act.²¹ But section 90 is obviously of no avail where a pedigree, even though more than 30 years old, does not purport to be in the handwriting of, or signed by, a particular person,²² or which is signed by the *patwari* or by some person on behalf of others;²³ and the admissibility of such pedigrees would depend on proof of their having been made, or their contents having been adopted, by some deceased members of the family, as mere production of an ancient document from the family archives cannot dispense with the proof that is necessary in such cases that the document was made or recognized by some deceased member of the family.²⁴ Some papers were filed at the time of the settlement of a village. The first of them was a genealogical table. At the end of the papers were the names of some of the persons whose names appeared in the said table. None of them affixed their signatures. It was stated that

16. See *Abdul Ghafur v. Hussain Bibi*, 12 L. 336: 58 I.A. 188: 130 I.C. 612: 1931 P.C. 45; *Khadam Hussain v. Mohammad Hussain*, 1941 L. 73; *Shiv Lal v. Jootha*, 1952 Raj. 167.

17. *Abdul Ghafur v. Hussain Bibi*, 12 L. 336: 58 I.A. 188: 130 I.C. 612: 1931 P.C. 45; *Khadam Hussain v. Mohammad Hussain*, 1941 L. 73.

18. Phipson, Ev., 6th Ed., 311.

19. *Mohammad Azim Khan v. Mohammad Saadat Ali Khan*, 136 I.C. 642: 1931 O. 177; see also *Kashi Singh v. Ram Narain*, 37 I.C. 138.

20. *Hazura Singh v. Mohindar Singh*, 1937 L. 599; *Kundan Lal v. Hukam Singh*, 1952 Punj. 115.

21. *Jagdeo v. Vithoba*, 105 I.C. 81:

1928 N. 20; *Bhabuti Singh v. Khetal Singh*, 21 I.C. 274; *Sarju Dei v. Ram Harakh*, 18 I.C. 250; see *Kashi Singh v. Ram Narain*, 37 I.C. 138; *Pritam Singh v. Tilok Singh*, 1954 Pepsu 14; *Gurdial Singh v. Crown*, 1949 E.P. 228: 51 P.L.R. 74.

22. *Mathura Prasad Singh v. Bhulan Singh*, 14 I.C. 339. In *Jagdeo v. Vithoba*, 105 I.C. 81: 1928 N. 20, however, section 90 was applied to a pedigree which did not purport to be in the handwriting of any particular person, but which had been proved aliunde to be in the handwriting of a particular person.

23. *Kashi Singh v. Ram Narain*, 37 I.C. 138.

24. Phipson, Ev., 6th Ed., 311.

the village **patwari** signed on behalf of the majority and that certain other persons signed on behalf of the rest. The settlement officer affixed at the end a statement that the owners of the village had verified the correctness of the statements. This verification took place after the **khewat** of the village had been prepared, so that the entries in the genealogical table could not be deemed to have been utilized in any way for the preparation of the **khewat**. It was not clear whether the attached names were placed at the end of the papers to record acceptance of the correctness of all or of only the last of the papers. Nor was the fact made clear by the settlement officer's order recording the verification. Held, that the genealogical table could not, in these circumstances, be held to be admissible in evidence.²⁵

Evidence of relationship derived from a pedigree inadmissible if pedigree not produced.—A statement by a person that he derived his information about the relationship existing between certain persons from a pedigree prepared by his father is inadmissible in evidence, without the pedigree being produced or a foundation being laid for admitting secondary evidence of the contents of the pedigree.²⁶ Where a **bhat** witness admitted that the pedigree produced by him in Court was largely a copy made by his father from an older book which was then in existence, and it was not alleged that the old book was in such a condition that it could not be produced, or that the entries made therein were undecipherable owing to age or owing to some other cause, it was held, having regard to sections 64 and 65 of the Act, that the pedigree produced in Court could not be looked upon as independent or original, and that secondary evidence could not be admitted as the original pedigree had not been produced.²⁷

Objection to the admissibility of a pedigree table must be taken in the trial Court.—Where a **kursinama** (pedigree table) purporting to have been made by an ancestor "by the pen of **gomashta**" was received without objection at the trial, the Privy Council did not allow an objection to its admissibility to be raised before it.²⁸

Statement in Wills.—The statement of relationship may be contained in an unprobated will.²⁹ A statement in a will by a deceased Hindu widow that a certain person is her daughter's son or related to her on her husband's side is admissible,³⁰ but a statement that the testator and his brothers were living, earning, and holding property separately is inadmissible, as it does not fall within the scope of section 32.³¹ Statements contained in a will to the effect that a beneficiary thereunder was the adopted son of the testator can be used as evidence of adoption if the statements were not made in the testator's own interest or in view of contemplated

25. *Kashi Singh v. Ram Narain*, 37 I. C. 138.

26. *Seshammal v. Kuppanaiyyangar*, 91 I.C. 462: 1926 M. 475.

27. *Hazarilal v. Har Govind*, 48 I.C. 375; see *Bejai Bahadur Singh v. Bhupindar Bahadur Singh*, 17 A. 456: 22 I.A. 139 (P.C.), where the admissibility of evidence based on a pedigree not produced was held by the Privy Council to be doubtful and its value practically nil; see also *Balmakund v. Bishwa*

Nath Singh, 52 I.C. 851.

28. *Shahzadi Begam v. Secretary of State for India*, 34 C. 1059: 34 I.A. 194 (P.C.); *Bindeshwari Singh v. Ram Raj Singh*, 1939 A. 61.

29. *Hitnarain Singh v. Rambarai Rai*, 7 P. 733: 1928 P. 459; but see *Moheswar Panda v. Sundar Narain Pattanaik*, 33 I.C. 342.

30. *Kidar Nath v. Mathumal*, 40 C. 555: 18 I.C. 946 (P.C.).

31. *Gokaldas Jethanand v. Chandibai*, 10 I.C. 967.

litigation.³² A statement in a will as to status is inadmissible under this clause.³³

Personal knowledge; evidence by a living witness on matters of pedigree inadmissible if based on hearsay of incompetent declarants, but admissible if based on hearsay of competent declarants.—On questions of relationship, the Act does not make the opinion of a witness relevant except when such opinion is expressed by conduct.³⁴ Nor is there any express provision in the Act making evidence of general reputation admissible as proof of relationship.³⁵ Therefore, where a witness gives evidence as to relationship and bases his evidence on information derived from others, the evidence will be rejected as mere "hearsay" unless it be shown that the information came from persons deceased who had special means of knowing the relationship. Thus, where, on a question of relationship, the statements of witnesses, who spoke from the information which they had derived from others but did not state the persons from whom they had derived this information, were rejected by the High Court as "hearsay", the Privy Council held the High Court justified in the manner in which the provisions of this section were applied by the High Court.³⁶ Witnesses should not be permitted by the Court to give their testimony as to matters which could not be within their own knowledge without first stating the source of their information. They should be required to prove the statements relied upon with proper particularity and with due attention to the requirement that the person making the statement had special means of knowledge. It cannot rightly be left to time or chance or cross-examination to disclose whether a statement has any basis which could give it admissibility under clause (5) of section 32.³⁷ In a case of this kind, where a witness has no personal knowledge of relationship but merely speaks from information and is unable to disclose the source of his information, it cannot be held that the information was given by a deceased person having special means of knowing the relationship, and unless this fact is established, the section is inapplicable and the general rule against hearsay excludes the information. But where a living witness gives evidence of relationship, which is based on information received from deceased ancestors, the evidence is admissible.³⁸ Where a witness gives evidence as to the relationship of persons whom he could not possibly have seen, it cannot be presumed that the witness derived his information from his deceased ancestors; and, in the absence of evidence to show that the witness is basing his evidence on information received from competent deceased persons, his evidence would be inadmissible.³⁹ Evidence of witnesses that they heard the names of the ancestors recited

32. Chandreswar Prasad Narain Singh v. Bisheshwar Pratan Narain Singh, 5 P. 777; 101 I.C. 289; 1927 P. 61.

33. Hollaram v. Dwarkadas, 1939 S. 145.

34. Section 50; Chunna Kunwar v. Mukat Behari Lal, 151 I.C. 338; 1934 A. 117.

35. Lakshmi Reddi v. Venkata Reddi, 1937 P.C. 201; Shiv Lal v. Jootha, 1952 Raj. 167; Chandulal v. Bibi Khatemonnessa, 1943 C. 76; I.L.R. (1942) 2 C. 299; see also notes to S. 50.

36. Shafiq-un-Nissa v. Shaban Ali Khan, 26 A. 581; 30 I.A. 217 (P.C.); Mohan Lal v. Tulsan, 109 I.C. 774; 1928 L. 824.

37. Lakshmi Reddi v. Venkata Reddi, 1937 P.C. 201; 168 I.C. 881.

38. Abdul Ghafur v. Hussain Bibi, 12 L. 336; 58 I.A. 188; 130 I.C. 612; 1931 P.C. 45; Bahadur Singh v. Mohar Singh, 24 A. 94; 29 I.A. 1 (P.C.).

39. Chunna Kunwar v. Mukat Behari Lal, 151 I.C. 338; 1934 A. 117.

by members of the family on ceremonial and other occasions is admissible in proof of pedigree.⁴⁰

Personal knowledge; declaration inadmissible if based on hearsay of persons not having special means of knowledge, but admissible if based on hearsay of persons having special means of knowledge.—According to English law, though the declaration as to relationship must come from a deceased relative only, it is not necessary that the declarant should have had personal knowledge of the fact stated; it is sufficient if his information purported to have been derived from other relations, or from general family repute or even simply from “what he has heard”, provided such “hearsay upon hearsay” does not directly appear to have been derived from strangers.⁴¹ The Act, however, makes relevant declarations not only of deceased relatives but of other persons as well, if such persons had special means of knowing the relationship; and it appears to be settled that the declarant’s knowledge need not be personal but may be derived from hearsay.⁴² But if the statement of a deceased person having special means of knowledge expressly purports to be based on the statement of another person, alive or deceased, who had no special means of knowledge, it seems that the statement will be inadmissible, on the analogy of the English rule which, as stated in the beginning of this paragraph, excludes declarations of relatives where they directly appear to be based on information derived from strangers.

Declaration contained in a document filed by the deceased or by the counsel or agent of the deceased.—Where a genealogical table which had been filed by a deceased member of the family in a previous suit was given in evidence in a subsequent suit as a declaration of the deceased member of the family, the Privy Council held it to be inadmissible, on the ground that the document not having been brought home to the deceased, except as being an exhibit binding on him for the purpose of the previous suit, his relation to the document in question was something entirely different from the personal knowledge and belief which must be found or presumed in any statement of a deceased person which is admissible in evidence.⁴³ A pedigree which cannot be shown to have been filed by a competent declarant or his agent is not, therefore, an admissible declaration of relationship.⁴⁴ If the declaration is contained in a document filed by the agent of a party in some previous proceedings,⁴⁵ or in a

40. *Debi Pershad Chowdhry v. Radha Chowdhraia*, 32 C. 84: 31 I.A. 160 (P.C.) referred to in *Bhojraj v. Sita Ram*, 1936 P.C. 60: 160 I.C. 45; *Madan Singh v. State*, 1954 Raj. 38: 1954 Cr. L.J. 258.

41. Phipson, Ev., 6th Ed., 310.

42. *Ramanathan Chetty v. Murugappa Chetty*, 1917 M. 930: 33 I.C. 969. In *Bahadur Singh v. Mohar Singh*, 24 A. 94: 29 I.A. 1 (P.C.), the Privy Council held evidence of a witness based on information received from ancestors admissible. In *Debi Persad Chowdhry v. Radha Chowdhraia*, 32 C. 84: 31 I.A. 160

(P.C.), evidence of witnesses that they had heard the names of the ancestors recited by members of the family on ceremonial and other occasions was held admissible in proof of the pedigree.

43. *Jagatpal Singh v. Jageshar Bakhsh Singh*, 25 A. 143: 30 I.A. 27 (P.C.); see also *Thakur Ganesh Bakhsh Singh v. Thakur Ajudhia Bakhsh Singh*, 1937 P.C. 310.

44. See *Mohammad Azim Khan v. Mohammad Saadat Ali Khan*, 136 I.C. 642: 1931 O. 177.

45. *Balbahaddar Singh v. Sripal Singh*, 48 I.C. 308.

suit or petition filed by the *vakil* of a party,⁴⁶ the presumption is that the document or petition was filed under the instruction of the party and it will be treated as the party's own declaration.

The declaration is admissible in declarant's favour even in his lifetime; section 32 and section 21; statements in the affidavit or deposition of a living person.—A statement in an affidavit or deposition by a person as to his date of birth would be admissible between third persons after his death. Such statement is, therefore, admissible, under section 32 clause (5) read with section 21, in the declarant's own favour even in his lifetime.⁴⁷ Similarly, a statement of the deceased as to his own age is admissible under section 32 (5) and section 21, even though it may be an admission in his own favour.⁴⁸ A statement made by a party as to the relationship of certain persons whose relationship he had special means of knowing is admissible in the declarant's favour under section 32(5) read with section 21(1), if the statement was made before any controversy.⁴⁹ A statement as to relationship contained in the pleadings is admissible in evidence as having been made before the question was raised by persons who had special means of knowing the relationship to which the statement relates.⁵⁰

Lis mota: the declaration must have been made before the commencement of any controversy.—The declaration to be admissible must have been made *ante litem motam*, i.e., before the commencement of any controversy, actual or legal, upon the same point.¹ The words "before the question in issue was raised" do not necessarily mean "before it was raised in the particular litigation in which such statement is sought to be adduced in evidence". A statement which was made after the question had been raised in the previous litigation is inadmissible in a subsequent suit even though it was made before the question was raised in the later suit.² The condition that the statement of the deceased person must be *ante litem motam* involves the idea that the dispute on the former occasion must not be the same in substance as the dispute in the later suit. In other words, the statement now sought to be used will not be concluded if it merely related to some matter, foreign or collateral to the matter in

46. Ramakrishna Pillai v. Tirunarayana Pillai, 55 M. 40: 139 I.C. 684: 1932 M. 198, Chandreswar Prosad Narain Singh v. Bisheshwar Pratap Narain Singh, 5 P. 777: 101 I.C. 289: 1927 P. 61; Kanhaiya Bux Singh v. Ram Dei Kuer, 1944 O. 162.
47. Ramanathan Chetty v. Murugappa Chetty, 33 I.C. 969.
48. Oriental Government Security Life Assurance Co., Ltd. v. Narasimha Chari, 25 M. 183, 207.
49. Jadu Nath Sarkar v. Mahendra Nath Rai, 12 C.W.N. 266.
50. Jan Mohammad v. R. B. Karam Chand, 1947 P.C. 99. 1947 A.L.J. 395: 60 M.L.W. 448: 49 B.L.R. 577: 51 C.W.N. 777: I.L.R. 1947 L. 399.

1. Phipson, Ev., 6th Ed., 310; Chendikamba v. Viswanathamayya, (1939) 1 M.L.J. 227; Biro v. Atma Ram, 64 I.A. 92: 1937 P.C. 101: 167 I.C. 346; Subbiah Mudaliar v. Gopala Mudaliar 1936 M. 808; Mata Bakhsh Singh v. Ajodhia Bakhsh Singh, 1936 O. 340: 163 I.C. 770; Bayava Shiddappa Desai v. Parvateva Basavanappa Bellad, 144 I.C. 442: 1933 B. 126; Mohammad Azim Khan v. Mohammad Saadat Ali Khan, 136 I.C. 642: 1931 O. 177; Rup Kishore v. Patrani, 50 A. 152: 107 I.C. 45: 1927 A. 818.
2. Brijmohan v. Kishun Lal, 1938 A. 443: 176 I.C. 441; Rup Kishore v. Patrani, 50 A. 152: 107 I.C. 45: 1927 A. 818.

controversy on the former occasion.³ Where the question of a person's legitimacy was in issue in mutation proceedings statements made by witnesses since deceased, in the course of such proceedings, would be inadmissible in a subsequent civil suit in which the question of his legitimacy arises.⁴ Statements with regard to relationship made in settlement proceedings at a time when the title to a portion of a **taluka** was under enquiry are not admissible in evidence in a subsequent litigation not **inter partes** in which the same questions are matters of controversy, as the dispute had arisen at the time when the statements were made.⁵ Clause (5) does not apply to statements made by interested parties in denial, in the course of litigation, of pedigrees set up by the opposite parties.⁶ In order that a declaration may be excluded on the ground of **lis mota**, it must be shown that the subject-matter of the declaration had come into controversy when the declaration was made. If it is not shown that the relationship had come into controversy at the time the statement was made, it will be admissible.⁷ A statement made in proceedings in which the heirship of the claimant in those proceedings was not in dispute is not inadmissible on the ground of **lis mota**.⁸ A statement by a deceased plaintiff describing his relationship with certain persons, contained in a plaint filed before the existence of any dispute concerning that relationship, is admissible in a subsequent suit in which the relationship is in dispute.⁹ Comparing the English common law rule with that enacted in section 32(5), the Patna High Court has held that a statement is admissible even though it was made in a case in which the issue was the same as in the case in which it is sought to be proved.¹⁰ The Madras High Court has, however, ruled that statements regarding the fact of an adoption, made in a previous suit in which the question of adoption was directly in issue, are not admissible in a subsequent suit, as they must be considered as having been made after the question in dispute was raised.¹¹

3. Bindeshwari Singh v. Ram Raj Singh, 1939 A. 61; Natabar Parichha v. Nimai Charan Misra, 1952 Orissa 75; see also Subbiah Mudaliar v. Gopala Mudaliar, 1936 M. 808.

4. Mumtaz-un-Nisa Begam v. Wazir Ali, 65 I.C. 308: 1921 O. 242.

5. Mata Bakhsh Singh v. Ajodhia Bakhsh Singh, 1936 C. 340: 163 I.C. 770.

6. Naraini Kuar v. Chandi Din, 9 A. 467; see also Jagatpal Singh v. Jageshar Bakhsh Singh, 25 A. 143: 30 I.A. 27 (P.C.). For a statement made in view of contemplated litigation, see Chandreswar Prosad Narain Singh v. Bisheshwar Pratap Narain Singh, 5 P. 777: 101 I.C. 289: 1927 P. 61.

7. Kalka Parshad v. Mathura Parshad, 30 A. 510: 35 I.A. 166: 1 I.C. 175 (P.C.); Jainath Kuar v. Danpal Singh, 1947 O. 164: 231 I.C. 203: 22 Luck. 249; Kalka Pershad v. Mathura Pershad, 35 I.A. 166: 30 A. 510: 1, I.C. 175 (P.C.);

Jadunath Kuar v. Bisheshar Baksh Singh, 1932 P.C. 142: 59 I.A. 173: 136 I.C. 747 (P.C.); Sukhdarshan Singh v. Chanan Singh, 1951 Pepsu 81.

8. Bahadur Singh v. Mohar Singh, 24 A. 94: 29 I.A. 1 (P.C.); Jai Nath Kuar v. Danpal Singh, 1947 O. 164: 231 I.C. 203: 22 Luck. 249.

9. Mauladad Khan v. Abdul Sattar, 39 A. 426: 39 I.C. 666. For the admissibility of a statement of relationship in a written statement, see Sarvabhotla Thotapalle Chendikamba v. Kanala Indrakanti Viswanathamayya, 1939 M. 446.

10. Gokhul Pande v. Baldeo Sukul, 7 P. 90: 105 I.C. 26: 1928 P. 113. This case, it is submitted, is not free from doubt and draws a wrong analogy from the decision of Petheram, C.J., in Dhanmull v. Ram Chunder Ghose, 24 C. 265.

11. Ramakrishna Pillai v. Tirunarayana Pillai, 55 M. 40: 139 I.C. 684: 1932 M. 198.

Value of evidence as to pedigree.—The evidence afforded by ancient pedigrees is at best evidence of tradition and in so far as the statements are interested, or contradictory, or disputed, they rapidly lose value. The fact that a pedigree is given in the course of the account of the history of a village does not (necessarily, at least) transmute it into something higher than tradition. Where the tradition has been ascertained with reasonable certainty, a proper value must be given to it on questions of pedigree, and it may be sufficient of itself; but that a case is difficult of proof does not dispense with proper proof, and in many cases there is good reason to regard tradition as poor and treacherous material.¹² The value of the evidence as to matters of pedigree depends on the character of the witnesses who depose to what they heard from deceased persons, and also on the character of the deceased persons and whether they were expressing their own opinion or merely repeating hearsay.¹³ It must always be a matter of great difficulty to prepare pedigrees in a country like India, where, there is no official register of births and deaths, where records of a family may be few, and where it is essential to depend for information upon the uncertain testimony of family traditions. Men's lives are swiftly forgotten and the memories of survivors often fail. It is, therefore, not a matter of surprise to find that pedigrees prepared in India and which may be accepted as honestly prepared are, nonetheless, not in actual agreement in every detail. A pedigree which has been subjected to investigation many years prior to the institution of the litigation in which it is questioned and which has previously been relied upon by competent authorities and is supported by verbal evidence may safely be accepted as correct.¹⁴ Where the question of relationship arises between people among whom accessible records of births and deaths are not maintained nor are such events preserved in written family memorials, the question must depend for its decision on oral tradition, and though this requires close scrutiny, the tradition ought not to be regarded as weak and unsatisfactory merely because it may in one or two respects fail to satisfy the strict conditions that would be necessary for proving a pedigree where records and documents could be used.¹⁵ Where a pedigree brings one down from the remotest ancestor to the generations living contemporaneously with a person in whose time it is prepared, the document is a record of family traditions as to pedigree and of the existence of persons contemporaneously alive. The authenticity of that part of the record which embraces the names of persons who existed before the living members rests on the absence of anything showing, directly or inferentially, that the pedigree was prepared with any motive other than the natural motive for preparing and preserving a record of family traditions relating to the family pedigree.¹⁶ Where the relationship in a pedigree table is corroborated in material parts by the oral evidence, and the table *prima facie* satisfies all the conditions prescribed by section 32(6) and section 90 of Evidence Act, a presumption should be made in favour of its genuineness.¹⁷ A state-

12. Ganesh Baksh Singh v. Ajudhia Bakhsh Singh, 1937 P.C. 310: 170 I.C. 335, per Sir George Rankin.

13. Mulchand Bassarmal v. Devigir Motigir, 1933 S. 213.

14. Doddawa Kom Bennepgowda v. Bennapagowda Bin Yenhangowda, 1925 P.C. 199; Mohammad Azim Khan v. Mohammad Saadat Ali Khan, 136 I.C. 642: 1931 O. 177.

15. Sabz Ali Khan v. Khair Mohammad Khan, 3 L. 48: 49 I.A. 74: 67 I.C. 264: 1922 P.C. 139; see also Mewa Singh v. Basant Singh, 48 I.C. 540: 1918 P.C. 49.

16. Jang Bahadur Singh v. Arjun Singh, 3 Luck. 256: 110 I.C. 466: 1928 O. 125.

17. Jagdeo v. Vithoba, 105 I.C. 81: 1928 N. 20.

ment in the will of a deceased Hindu widow that a certain person was her daughter's son was held by the Privy Council to be conclusive evidence of this relationship, when corroborated by other relatives and not contradicted by other reliable evidence.¹⁸ Entries of relationship in **pandas'** books¹⁹ or in the books of the priests of Hardwar, Mathura and Thaneswar, though admissible, have to be taken with great caution if they appear in leaflets or stitched books containing blank pages or spaces which admit of interpolations.²⁰ A passage in a District Gazetteer cannot take the place of a pedigree.²¹

**CLAUSE (7) : DECLARATIONS RELATING TO A TRANSACTION
BY WHICH A RIGHT IS CREATED, ASSERTED, ETC.**

Scope and application of clause (7).—The following conditions are necessary for the admissibility of a statement under this clause, namely, (1) the statement should be contained in a document, (2) it should have been made by a person who is dead, and (3) the document should relate to what can be called a transaction within the meaning of section 13(a) of the Act.²² The object of the clause is that the statement must have been made in relation to a transaction where it was necessary to make the statement. The section aims at keeping out gratuitous statements which were either not necessary to be made at the time and on the occasion when they were made or which it was not the duty of the party who made them to make.²³

The clause does make relevant statements made in deeds, wills and such other documents which relate to transactions by which a right or custom in question was created, claimed, modified, recognised, asserted or denied. It does not allow introduction of oral evidence, but such oral evidence may be relevant under clause (5) of this Section, which, however, requires that such a statement should have been made before the question in dispute was raised.²⁴

Statements contained in a document relating to any such transaction as is mentioned in section 13(a).—This clause, read with section 13(a), makes statements by deceased persons in respect of relevant facts themselves relevant, if those statements are contained in a document which relates to a transaction by which an assertion is made of a right or title which is a relevant question in the suit.²⁵ Since section 13 is applicable to both public and private rights and customs,²⁶ this clause also must be taken to apply to public as well as private rights and customs. A deed executed by the plaintiff and some deceased persons, to which the defendant is not a party and which contains a recital as to the existence of a pri-

18. *Kidar Nath v. Mathumal*, 40 C. 555: 18 I.C. 946: 77 P.R. 1913 (P.C.).

19. *Collector of Farrukhabad v. Gajraj Singh*, 15 I.C. 625.

20. *Acharaj Ram v. Ganesh Das*, 151 I.C. 622: 1934 Pesh. 78; *Balak Ram High School, Panipat v. Nanu Mal*, 11 L. 503: 128 I.C. 532. 1930 L. 579; *Collector of Farrukhabad v. Gajraj Singh*, 15 I.C. 625.

21. *Balmakund v. Bishwa Nath Singh*, 52 I.C. 851.

22. *Khudiram Ojha v. Amodebala Debi*, 1948 P. 426.

23. *Khudiram Ojha v. Amodebala Debi*, 1948 P. 426.

24. *Dwarka Nath v. Lalchand*, (1965) 1 S.C.W.R. 947.

25. *Nallasiva Mudaliar v. Ravan Bibi*, 70 I.C. 389: 1921 M. 383.

26. See notes to section 13.

vate custom, e.g., a family custom, is admissible in proof of that custom, without the plaintiff being examined as a witness.²⁷ A statement of a deceased person, contained in a deed of family settlement, to the effect that after the death of his father, a partition was effected amongst the brothers, is not admissible under this clause.²⁸

Section 32(7) and 32(3).—In *Bhagwati Prasad Sah's* case the Supreme Court of India held that the assertion in a mortgage bond by the deceased that other co-parceners were also separate is admissible as connected matter and integral part of the statement, viz. that he was separated from the joint family, under section 32(3) and not under section 32(7).²⁹

Transaction must be one by which, and not in which, the right or custom was created, asserted, etc.—To disprove a right or custom, it is not enough to adduce evidence of a transaction in which or in the course of which the right or custom was asserted or denied. The transaction is relevant under section 13(a) only if it be one by which and not one in which the right or custom was asserted or denied.³⁰ Thus, where the question was whether a tenant held land under the *nakdi* or a different system of rent and the Court based its decision on a statement contained in a deed of gift executed by a deceased ancestor of the defendant that the land was held under the *nakdi* system of rent, it was held that the decision was based on an inadmissible statement, as the deed of gift was not a transaction by which the *nakdi* nature of the holding was asserted but was only a transaction in which the *nakdi* nature of the holding was asserted.³¹ Statements of fact contained in a will executed by a Hindi coparcener to the effect that the properties dealt with in the will are his self-acquired properties are admissible to prove the character of the properties.³²

Statements in the will of a deceased person.—Where, in a suit for possession of lands as their *nishkar brahmottar*, the plaintiffs relied upon a recital of *brahmottar* title in the will of their deceased father, the recital in the will was held not to be admissible under this clause.³³ A non-probated will is not admissible in evidence under sections 32(7) and 13(a), except on proof by an attesting witness that it had been executed in accordance with section 50 of the Indian Succession Act.³⁴ A statement taken by a Sub-Registrar in the house of the testator before registering the will is admissible under this clause.³⁵

Assertion of title in a mortgage-deed by a deceased mortgagor is admissible in proof of ownership.—An assertion of title as owner, found

27. 10 B.L.R. 263.

28. *Raj Narain v. Maharaj Narain*, 1937 O. 133: 165 I.C. 785.

29. 1952 S.C.J. 115.

30. *Subbarayalu Naidu v. Vengama Naidu*, 123 I.C. 197: 1930 M. 742; *Brojendra Kishore Roy Chaudhuri v. Mohim Chandra Bhattacharji*, 99 I.C. 189: 1927 C. 1; *Saripalli Venkatayagopala Raju v. Fota Narasayya*, 26 I.C. 747; *Bansi Singh v. Mir Amir Ali*, 11 C.W.N. 703.

31. *Bansi Singh v. Mir Amir Ali*, 11 C.W.N. 703.

32. *Venkataramayya v. Seshamma*, I. L.R. 1937 M. 1012: 1937 M. 538: 170 I.C. 107.

33. *Satindra Kumar Chaudhury v. Krishna Kumari Chaudhurani*, 36 I.C. 882.

34. *Moheswar Panda v. Sundar Narain Pattanaik*, 33 I.C. 342: 22 Cr. L.J. 551; see, however, *Hitnarain Singh v. Rambarai Rai*, 7 P. 733: 1928 P. 459.

35. *Muthukrishna Naicken v. Ramachandra Naicken*, 47 I.C. 611.

in a document and implied by the transaction itself, is admissible under section 13 as evidence of ownership, and a statement which forms the recital in the document as to how the title was acquired is also admissible under section 32(7), if the person making the recital is dead.³⁶ A deed of mortgage, executed by a mortgagor since deceased, and containing an assertion of title, is admissible, under this clause, on the question of ownership;³⁷ and may be sufficient proof of ownership if corroborated by other evidence.³⁸

Other instances of assertion.—A statement contained in a deed of adoption that the sons of the adopter was suffering from a virulent and incurable form of leprosy at the time of the adoption, is a relevant fact for deciding whether adoption during the lifetime of those sons was valid or not, and is admissible under section 32(7).³⁹ A statement by a deceased person, who filed in some previous proceeding a copy of an original grant, that the copy was a true copy of the grant, is admissible evidence under section 32 (7) and section 13.⁴⁰ Where in a criminal case relating to the possession of land, the parties appointed a *mukhtear* as an arbitrator and agreed to abide by his decision, and the *mukhtear* accordingly made a local inquiry and submitted a report, the report of the deceased *mukhtear* is admissible under this clause.⁴¹

CLAUSE (8): STATEMENTS MADE BY A NUMBER OF PERSONS EXPRESSING THEIR FEELINGS OR IMPRESSIONS

Principle.—This clause means that when a number of persons assemble together to give vent to one common statement which expresses the feelings or impressions produced in their mind at the time of making it, that statement may be given in evidence,⁴² if the persons or some of the persons who made that statement are dead or cannot be examined as witnesses for any of the reasons mentioned in section 32. "This clause relates to statements expressing feelings or impressions, not of an individual but an aggregate of individuals, as the exclamations of a crowd; and the evidence is receivable on account of the difficulty or impossibility of procuring the attendance of all the individuals who composed such crowd or aggregate of persons.⁴³ Illustration (n) to this section which exemplifies this clause is taken from the well-known English case of *Du Bost v. Beresford*⁴⁴ where, in an action for damages for destroying a picture, the defendant, in support of his plea that he was justified to destroy the picture as it was a libel calculated to bring two of his relations into public ridicule, was allowed to give in evidence exclamations of recognition of the picture by the spectators.

36. *Nallasiva Mudaliar v. Ravan Bibi*, 70 I.C. 389: 1921 M. 383.

37. *Nallasiva Mudaliar v. Ravan Bibi*, 70 I.C. 389: 1921 M. 383; *Visalakshi Ammal v. Dorasinga Pillai*, 29 I.C. 974.

38. *Visalakshi Ammal v. Dorasinga Pillai* 29 I.C. 974.

39. *Nagammal v. Sankarappa Naidu*, 54 M. 576: 131 9. 1931 M. 264.

40. *Subrahmanya Somayajulu v. Seethavya*, 46 M. 92: 70 I.C. 729: 1923 M. 1 (F.B.), confirmed by the

Privy Council in *Seethayya v. Subrahmanya Somayajulu*, 52 M. 453: 56 I.A. 146: 117 I.C. 507: 1929 P.C. 115; but see *Ambalavana Pandarasannadhi v. Kuppachi Janaki Ammal*, 35 I.C. 201.

41. *Guru Charan Rudra Pal v. Mufjud-din Molla*, 65 C.L.J. 603.

42. *The Queen v. Ram Dutt Chowdhry*, 23 W.R. 25 Cr.

43. Woodroffe, Ev., 9th Ed., 361.

44. *Du Bost v. Beresford*, 2 Camp. 512.

33. Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take Relevancy of certain evidence for proving, in subsequent proceeding, ~~the~~ subsequent judicial proceeding, or in a later stage if the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable :

Provided—

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

COMMENTARY

Principle and reason.—The general rule is that all evidence must be direct,⁴⁵ i.e., the witness must himself appear in Court to give *viva voce* evidence of the facts which he claims to have perceived. This section enacts the second exception to this general rule. Where a witness is not available, but it so happens that he had previously given evidence in proceedings between the same parties involving the same issue or issues, and the parties had the right and opportunity to cross-examine him, this section, on grounds of necessity and convenience, permits the previous deposition of such witness to be given in evidence in subsequent proceedings between the same parties.

Proof of unavailability of the witness is a necessary prerequisite for the admission of former deposition.—This section makes a previous deposition admissible only when the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an unreasonable amount of delay or expense.⁴⁶ Therefore, where the witness is alive and

45. See section 60.

46. *Bal Gangadhar Tilak v. Shri Shrinivas Pandit*, 39 B. 441: 42 I.A. 135: 29 I.C. 639: 1915 P.C. 7; see *Supdt. & Remembrancer of Legal Affairs, Bengal v. Forhad*, 153 I.C. 493: 1934 C. 766: 36 Cr. L.J. 364.

47. *Supdt. & Remembrancer of Legal Affairs Bengal v. Forhad*, 153 I.C.

493: 1934 C. 766: 36 Cr. L.J. 364; *Ram Parkash Das v. Anand Das*, 43 C. 707: 43 I.A. 73: 33 I.C. 583 (P.C.); *E. v. Mulu*, 2 A. 646; *Bhobun Moyee Dossee v. Umbica Churn Sett*, 23 W.R. 343; the same was the ground of rejection of a former deposition in *Mohammad Khan v. Mst. Fattan*, 12 P.L.R. 1919.

available⁴⁷ and none of the conditions mentioned in the section is fulfilled⁴⁸ there is no occasion for the application of the section. Section 33 is inapplicable where the witness is produced at the trial but is shy and speechless; in such circumstances the statement of the witness before the committing Magistrate cannot be transferred to the Sessions record under this section.⁴⁹ It is for the party wishing to give in evidence a former deposition to make out a case for its reception under the provisions of this section.⁵⁰

Provisions of the section should be applied sparingly and with caution; evidence of, and reasons for, application of the section should be formally recorded.—The provisions of the section must be strictly applied and the circumstances mentioned therein must be strictly proved before a deposition can be accepted as evidence.¹ But it is difficult to lay down a hard and inflexible rule which should govern all cases of the application of the section. It is primarily for the Court to satisfy itself that there are good and lawful grounds for admitting evidence of witnesses under this section.² Where it is desired to have recourse to this section on the ground that a witness is incapable of giving evidence, that fact must be proved, and proved strictly. It is an elementary right of an accused person or a litigant in a civil suit that a witness who is to testify against him should give his evidence before the court trying the case which then has the opportunity of seeing the witness and observing his demeanour and can thus form a far better opinion as to his reliability than is possible from reading a statement or deposition. It is necessary that provision should be made for exceptional cases where it is impossible for the witness to be before the court, and it is only by a statutory provision that this can be achieved. But the Court must be careful to see that the conditions on which the statute permits previous evidence given by the witness to be read are strictly proved.³ The application of this section is essentially a matter of discretion.⁴ The powers given by the section should be exercised only sparingly,⁵ and with great caution.⁶ The courts should be loath to admit evidence under this section by observing only formalities of law and the importance of examining witnesses before the Court should, under no circumstances, be underrated.⁷ In criminal cases the application of the section must be confined within the narrowest limits,⁸ and where a man is being tried for his life and the evidence sought to be put in is of signal

48. Supdt. & Remembrancer of Legal Affairs Bengal v. Forhad, 153 I.C. 493: 1934 C. 766: 36 Cr. L.J. 364; Ghulam Haidar v. E., 10 L. 837: 116 I.C. 329: 1929 L. 542: 30 Cr. L.J. 623; Brajaballav Ghose v. Akhoy Bagdi, 93 I.C. 115: 1926 C. 705; Dwarka Singh v. E., 74 I.C. 860: 1922 O. 254: 24 Cr. L.J. 828: see also Bela Rani v. Mahabir Singh, 34 A. 341: 14 I.C. 116; S. C. Mitter v. State, 1950 C. 435: 86 C.L.J. 21; Behera Tanti v. State, 1950 Orissa 202: 51 Cr. L.J. 1493.

49. Moti Ram v. E., 75 I.C. 152: 24 Cr. L.J. 904.

50. Section 104; S. C. Mitter v. State, 1950 C. 435: 86 C.L.J. 21 distinguished in State v. Gajraj, 1953

Raj. 66: 1953 Cr. L.J. 577.

1. Behera Tanti v. State, 1950 Orissa 202: 51 Cr. L.J. 1493.

2. Gaya Prasad v. State, 1954 A. 59: 1954 Cr. L.J. 68.

3. Chainchal Singh v. K.E., 1946 P. C. 1.

4. Jati Mali v. E., 1929 C. 765.

5. E. v. Mulu, 2 A. 646.

6. Nga Nyo v. E., 1 R. 512: 76 I.C. 817: 1924 R. 209: 25 Cr. L.J. 257; In re Pyari Lall, 4 C.L.J. 504; Q. v. Nawjan alis Nane Khan, 20 W.R. 69 Cr.

7. Gaya Prasad v. State, 1954 A. 59: 1954 Cr. L.J. 68.

8. Lakshman Totaram v. E., 31 I.C. 354: 16 Cr. L.J. 754: 17 Bom. L. R. 590.

importance, the Court must insist on strict proof before holding that the conditions requisite for admitting a former deposition have been satisfied.⁹ Where a former deposition is admitted under the provisions of this section, the grounds for its admission should, before such deposition is admitted in evidence, be fully and clearly stated, preferably in a separate order,¹⁰ to enable the appellate Court to judge of their adequacy.¹¹ But an omission to record at the proper stage the reasons for admitting such evidence is a mere irregularity curable under section 537, Cr. P. Code.¹² The circumstances which justify the reception in evidence of a former deposition should be proved like any other fact in the case,¹³ evidence as to the existence of such circumstances should be formally recorded,¹⁴ and the matter determined judicially.¹⁵ A mere statement by the Public Prosecutor that the witness cannot be found is insufficient.¹⁶ There must be independent evidence before a Court before it can exercise the powers given to it by section 33 of the Evidence Act. The appellate Court may not be prepared to act upon representations which have satisfied the trial Court and, therefore, it is incumbent on the lower Court to have on record some legal evidence on which it intends to act.¹⁷ Where, however, a witness is stated by other witnesses to be ill, it is not absolutely necessary, to examine a qualified medical practitioner.¹⁸ In a recent case where the fact of illness of a witness and his inability to attend was sought to be proved by the evidence of the Police Officer who served the summons, the Privy Council excluded the evidence, Lord Goddard who delivered the judgment observing "In the present case the only evidence was that of the Police Officer already mentioned and his visit was thirteen days before the trial. The officer was not a proper person to prove from what disease the witness was suffering; he could only say what someone told him. If such evidence as he gave were sufficient it would mean that any reluctant witness could take to his bed when he found there was a likelihood of being served with a witness summons and get excused from attendance by telling the server that he was suffering from some serious

9. *Nga Nyo v. E.*, 1 R. 512: 76 I.C. 817: 1924 R. 209: 25 Cr. L.J. 257; *Kala v. E.*, 1944 L. 206; *Saudagar Singh v. E.*, 1944 L. 377; *Kanhaiyalal Sewaram v. State*, 1953 M.B. 262: 1954 Cr. L.J. 6; *Isher Dass v. State*, 1954 J. & K. 19.
10. *Nga Nyo v. E.*, 1 R. 512: 76 I.C. 817: 1924 R. 209: 25 Cr. L.J. 257; *Savlimiya Miyabhai v. E.*, 1944 B. 338; *E. v. Gajendra Mohan Kar*, 1943 C. 222: I.L.R. (1943) I.C. 405.
11. *Mokshed Sheikh v. E.*, 129 I.C. 105: 1930 C. 756: 32 Cr. L.J. 233; *Nga Nyo v. E.*, 1 R. 512: 76 I.C. 817: 1924 R. 209: 25 Cr. L.J. 257; *Annabi Muthiriyar v. E.*, 39 M. 449: 28 I.C. 518: 16 Cr. L.J. 294; *E. v. Fateh Ali*, 1881 A.W.N. 51; *Q. v. Nawjan alias Nane Khan*, 20 W.R. 69 Cr.
12. *Nga Ba On v. E.*, 104 I.C. 637: 1927 R. 248: 28 Cr. L.J. 861.
13. *Sajjan Singh v. E.*, 6 L. 437: 90 I.C. 145: 1925 L. 418: 26 Cr. L.J. 1489; *Khem Singh v. E.*, 88 I.C. 30: 1924 L. 319: 26 Cr. L.J. 1086; L. B.R. (1872—92) 134.
14. *Satish Chandra Seal v. E.*, 1945 C. 197; *Indar v. E.*, 129 I.C. 195: 1930 L. 1041: 32 Cr. L.J. 256; *Khem Singh v. E.*, 88 I.C. 30: 1925 L. 319: 26 Cr. L.J. 1086; *E. v. Mulu*, 2 A. 646; *Q.E. v. Ram Sarup*, 1898 A.W.N. 22.
15. *Satish Chandra Seal v. E.*, 1945 C. 197; *Indar v. E.*, 129 I.C. 195: 1930 L. 1041: 32 Cr. L.J. 256; *Mokshed Sheikh v. E.*, 129 I.C. 105: 1930 C. 756: 32 Cr. L.J. 233; *Ghulam Haidar v. E.*, 10 L. 837: 116 I.C. 329: 1929 L. 542: 30 Cr. L.J. 623.
16. *Indar v. E.*, 129 I.C. 195: 1930 L. 1041: 32 Cr. L.J. 256; *Mokshed Sheikh v. E.*, 129 I.C. 105: 1930 C. 756: 32 Cr. L.J. 233.
17. *Nga Chit Tin v. The King*, 1939 R. 225; *Annabi Muthiriyar v. E.*, 39 M. 449: 28 I.C. 518: 16 Cr. L.J. 294.
18. *Alijan v. E.*, 103 I.C. 846: 1927 C. 679: 28 Cr. L.J. 766.

complaint. Their Lordships do not mean to lay down that in every case there must be evidence of a medical man, where excuse is sought on the ground of physical incapacity. That is not the law in England (see *R. v. Noakes* [1917] 1 K.B. 581), and there is no reason for a different rule to apply in India. There may be many cases in which the facts are such, that the incapacity can be proved by a lay witness. Here there was no evidence at all except that the policeman found the witness was ill thirteen days before the trial and as he was not competent to speak to the illness their Lordships are of opinion that there was no evidence before the Court that he was incapable of giving evidence on 19th January. The learned Additional Judge was no doubt largely influenced by counsel for the accused consenting to the evidence being read, but in their Lordships' opinion that does not do away with the necessity of the Court being satisfied by proof. Neither counsel nor his client could have had any personal knowledge on the subject, unless indeed counsel had recently seen the witness, in which case he could have so informed the Court and not merely given a consent. It may be that there are some matters as to which it would be possible for a prisoner to consent to be taken as proved though no strict evidence was given; if there are, as to which their Lordships express no opinion, they could only be such as might reasonably be supposed to be particularly within the knowledge of the accused. Their Lordships accordingly consider that this previous statement was wrongly admitted. Their Lordships would also observe that though in this case the accused was represented before the committing Magistrate and the witness was therefore cross-examined, in very many of these cases the accused is not represented at this stage, so while he has the opportunity to cross-examine it is not often that this would be effectively done. This is another reason for exercising great care before admitting a statement".¹⁹

The Court can hold evidence, given in a prior judicial proceeding, or before any person authorised by law to take it, relevant only, if it is satisfied that the requisite conditions mentioned in this section are fulfilled. It is, no doubt, open to the parties to admit that the requisite conditions are fulfilled. But if the parties do not admit this fact, evidence given in a former judicial proceeding, or before any person authorised by law to take it, cannot become relevant under the provisions of this section, if the conditions stated in this section are not fulfilled.²⁰

Effect of consent to the admission of inadmissible evidence in civil and criminal cases.—A civil suit is a proceeding *inter partes*; and as parties can by consent settle its final result by having a consent decree passed, there is no reason why they should not be permitted to consent to treat something as evidence of a relevant fact, which otherwise may not be evidence of that fact. In a civil case, where no question of public policy is involved, a party may waive the benefit of the provisions of section 33, which are merely intended for his benefit; and where a party has done so and the trial judge has admitted and acted upon a former deposition which was in fact not admissible under section 33, the consenting party will not be allowed to object to its admissibility in appeal.²¹ But

19. *Chainchal Singh v. K.E.*, 1946 P. C. 1; *Kesar Singh v. State*, 1954 Punj. 286.
20. *Nathubhai v. Chhotubhai*, 1962 Guj. L.R. 418.

21. *Chainchal Singh v. K.E.*, 1946 P. C. 1; *Ayyavar Thevar v. Secretary of State*, 1942 M. 528; *Jainab Bibi Saheba v. Hyderally Saheb*, 43 M. 609; 56 I.C. 957 (F.B.) overruling

in criminal cases a prisoner can consent to nothing; and an omission to object,²² or consent to the admission of evidence which is inadmissible under section 33 cannot make the evidence admissible.²³

When the witness is dead.—The death of the witness must be proved.²⁴ like any other fact, by the evidence of witnesses and a mere report that the witness is dead is not sufficient.²⁵ Under sections 107, 108 and 114, however, death may, in appropriate cases, be presumed to have occurred.

Where witness died before the sessions trial began it was held that his evidence in Committing Court was admissible under section 33.²⁶

Person making the statement died before her statement could be recorded before the Magistrate—Statement inadmissible under this section.—Mst. Jatri had two daughters, Baishakhi and Aghani. The mother had gone out to pluck wild berries leaving the daughters in the house. When she returned in the noon she found only Aghani. She enquired where Baishakhi was and Aghani made certain statement to her mother and also to others but before her statement was recorded before the Magistrate she died. Baishakhi did not return in the evening. On search, her headless body was found lying near the village. The statements of Aghani who died within a few months of the occurrence before her statements could be recorded in a judicial proceeding, were not admissible in evidence either under section 32 or section 33 of the Evidence Act. Section 33 was clearly out of the way because Aghani made no statements in a judicial proceeding or before any person authorised by law to take her evidence.²⁷

When the witness cannot be found.—Where a witness is untraceable,²⁸ or has disappeared, so that it is impossible to serve him.²⁹ his former deposition may be properly admitted under this section. In other cases it must be shown that the witness cannot be found by ordinary care

Ponnusami Pillai v. Singaram Pillai, 41 M. 731: 46 I.C. 849; Lakshnidevamma v. Pobhisetti Krishtiah, 104 I.C. 518: 1927 M. 1107; Varadarajulu Chetti v. Velayudha Udayan, 90 I.C. 743: 1925 M. 1160; Radha Kishan v. Kedar Nath, 46 A. 815: 80 I.C. 874: 1924 A. 845; Bobba Bhavamma v. Bobba Ramamma, 78 I.C. 176: 1924 M. 537; Lakshman Gobind v. Amrit Gopal, 24 B. 591; but see Luchiram Motilal v. Radha Charan Poddar, 49 C. 93: 66 I.C. 15: 1922 C. 267; Ratna Munda v. State, 52 Cr. L.J. 685; Nitua Nanda Mandhata Patnaik v. Binayak Sahu, 1955 Orissa 129; see also Rangasami Naidu v. Sundarajulu Naidu, 35 I.C. 52.

22. E. v. Fateh Ali, (1881) A.W.N. 51; S. C. Mitter v. State, 1950 C. 435: 86 C.L.J. 21.

23. Chainchal Singh v. K. E., 1946 P.C. 1; Savlimiya Miyabhai v. E., 1944 B. 338; Mokshed Sheikh v.

E., 129 I.C. 105: 1930 C. 756: 32 Cr. L.J. 233; Abdul Gaffoor v. Govind Prasad, 117 I.C. 241: 1928 R. 284: 30 Cr. L.J. 736; Ghulam Haidar v. E., 10 L. 837: 116 I.C. 329: 1929 L. 542: 30 Cr. L.J. 623; In re Kottammal Kolathingal Umar Hajee, 46 M. 117. 69 I.C. 636: 1923 M. 32: 23 Cr. L.J. 748; Annavi Muthiriyar v. E., 39 M. 449: 28 I.C. 518: 16 Cr. L.J. 294; Ratna Munda v. State, 52 Cr. L.J. 685; Kesar Singh v. State, 1954 Punj. 286.

24. Sajjan Singh v. E., 6 L. 437: 90 I.C. 145: 1925 L. 418: 26 Cr. L.J. 1489.

25. L.B.R. (1872—92) 134.

26. State v. Dhusa Kandy, 1970 Cr. L.J. 1322 (Orissa).

27. Ratan Gond v. The State of Bihar, 1959 S.C.R. 1336: 1959 Cr. L.J. 108: 1959 S.C.J. 222.

28. Ajodhi v. E., 56 I.C. 582: 21 Cr. L.J. 486.

29. E. v. Rochia Mohato, 7 C. 42.

and the use of ordinary means,³⁰ and that reasonable exertion has been made to find him.³¹ Where a constable who goes to serve the summons on the witness does not find him at his house, he having gone to his other residence,³² or the witness fails to attend on the date fixed, it cannot be said that the witness cannot be found;³³ and if there is nothing of a special kind to stand in the way, the case should be adjourned to some other day,³⁴ and warrant issued³⁵ and further attempt made to enforce his attendance.³⁶ A mere statement by the Public Prosecutor that the witness cannot be found is insufficient.³⁷ Where the Sessions trial commenced before the return of the **subpoena** of a witness and the Sessions Judge admitted in evidence the deposition of the witness before the committing Magistrate without waiting for the return of the **subpoena**, or without taking any other step to secure the presence of the witness, the High Court held the admission of the deposition not justified under the provisions of section 33.³⁸ This section is inapplicable to a case where the only evidence in support of the assertion that a witness cannot be found is the statement of a Police Officer that search was made for the witness but he could not be found and that a warrant was also issued, but the warrant is not produced that there is no evidence of any attempt to serve it.³⁹ The statement of a Head Constable that he went thrice to the house of the witness and was unable to find him in the village is not sufficient to establish that the attendance of the witness cannot be procured.⁴⁰ But where the Police Officer in charge of the case stated on good authority before the Sessions Judge that inquiries were made about the whereabouts of the witness but he could not be traced and no attempt was made by the defence to challenge the statement of the Police Officer, the requirements of the section were held to have been complied with.⁴¹ If a witness has left his residence, an effort should be shown to have been made to find him,⁴² and if the residence of the witness was temporary, the authority serving the summons should look for him at his original place of residence.⁴³ When the failure of the witness to appear is due to the failure of the prosecuting agency to take out a summons for the witness in good time, the use of section 33 is improper.⁴⁴

A statement of a witness recorded before the Committing Magistrate can be taken on record under section 33 at the Sessions trial only if his present whereabouts are not known and cannot be discovered. In the present case evidence before the Committing Magistrate of a doctor at an

- | | |
|--|---|
| 30. Q. v. Nawjan alias Nanhe Khan, 20 W.R. 69 Cr. | 39. E. v. Kangal Mali, 41 C. 601: 26 I.C. 161: 15 Cr. L.J. 713. |
| 31. Q. v. Luckhy Narain Nagory, 24 W.R. 18 Cr.; Murli Singh v. Rex, 1951 A.L.J. 677. | 40. Dwarka Singh v. E., 74 I.C. 860: 1922 O. 254: 24 Cr. L.J. 828. |
| 32. Hari Prasad v. State, 1953 A. 660: 1953 Cr. L.J. 1496: 1953 A.L.J. 318. | 41. Jati Mali v. E., 57 C. 248: 125 I.C. 599: 1929 C. 765: 31 Cr. L.J. 857. |
| 33. E. v. Nanhe Khan, 2 Cr. L.J. 518. | 42. Abdul Gaffoor v. Govind Prasad, 117 I.C. 241: 1928 R. 284: 30 Cr. L.J. 736. |
| 34. Q. v. Lukhun Santhal, 21 W.R. 56 Cr. | 43. Q. v. Luckhy Narain Nagory, 24 W.R. 18 Cr., Hari Prasad v. State, 1953 A. 660: 1953 Cr. L.J. 1496: 1953 A.L.J. 318. |
| 35. E. v. Nanhe Khan, 2 Cr. L.J. 518. | 44. Nasib Singh v. E., 1943 L. 89: 207 I.C. 32: 44 Cr. L.J. 552; Lal v. E., 1943 L. 118: 207 I.C. 243: 44 Cr. L.J. 627; see also notes to section 32 under the heading "who cannot be found". |
| 36. Dwarka Singh v. E., 74 I.C. 860: 1922 O. 254: 24 Cr. L.J. 828. | |
| 37. Annavi Muthiriyar v. E., 39 M. 449: 28 I.C. 518: 16 Cr. L.J. 294. | |
| 38. Ghulam Haidar v. E., 10 L. 837: 116 I.C. 329: 1929 L. 542: 30 Cr. L.J. 623. | |

hospital in whose presence a dying declaration was recorded, was brought on record at the Sessions trial under section 33. It was established that the summons could not be served on the doctor because at the time of the Sessions trial he had left his employment at the hospital and inquiries failed to disclose his "present whereabouts". The Sessions Judge took the previous statement on record on the ground that there was no likelihood of the witness being available without unreasonable delay and expense, and no objection was taken thereto by the defence. It was held that there was no infirmity in the order and the previous statement so taken on record was admissible in evidence.⁴⁵

Incapable of giving evidence; illness.—The expression "incapable of giving evidence" contemplates such cases as where the witness has become insane or, owing to illness or some other infirmity, is unable to attend the Court. Whether, owing to the illness of the witness, his evidence should be taken on commission, or the trial postponed till such time as the witness is likely to recover, or his former deposition should be admitted under the provisions of this section, is a question for the determination of the trial Judge, and the answer to this question would depend on the individual circumstances of each case.

The illness of the witness must be proved and its nature indicated,⁴⁶ though it is not absolutely necessary to call a doctor to prove it.⁴⁷ Incapacity due to a temporary cause, such as illness, is not the kind of incapacity contemplated by the section,⁴⁸ and in such cases of temporary illness the Court can admit a previous deposition under this section only if the attendance of the deponent cannot be secured without an unreasonable amount of delay or expense.⁴⁹

Where a witness appears before the Sessions' Court and is examined but is not cross-examined due to illness, his statement made in the committing court cannot be taken into consideration under this section.⁵⁰

When the witness is kept out of the way by the adverse party.—The proposition that if a witness be kept out of the way by the adverse party his former statement will be admissible, rests chiefly on the broad principle of justice, which will not permit a party to take advantage of his own wrong.¹ The mere fact that the witness was examined by the first party on the previous occasion and cited by him on the subsequent occasion, though not actually examined, and that when cited by the second party the witness did not appear, does not, in the absence of evidence that he is being kept out of the way by the first party, entitle the second party to let in his previous deposition under the provisions of section 33². If the witness is kept out of the way by one prisoner, the previous deposition of the witness will be admissible only against the particular prisoner who has kept the witness out of the way, and not against the other prisoners.³

45. Bakhshish Singh v. State of Punjab, 1958 S.C.R. 409; 1957 Cr. L.J. 1459; 1958 S.C.J. 106.

46. Abdul Gaffoor v. Govind Prasad, 117 I.C. 241; 1928 R. 284; 30 Cr. L.J. 736; E. v. Asgur Hossein, 6 C. 774.

47. Alijan v. E., 103 I.C. 846; 1927 C. 679; 28 Cr. L.J. 766.

48. Hari Prasad v. State, 1953 All. 660; 1953 Cr. L.J. 1496; 1953 A.L.J. 318; In re Pyari Lall, 4 C.L.R.

504; but see E. v. Asgur Hossein, 6 C. 774.

49. In re Pyari Lall, 4 C.L.R. 504; E. v. Gajendra Mohan Kar, 1943 C. 222; 47 C.W.N. 271.

50. Kanteswar Chowdhury v. Province of Assam, 1950 Assam, 77.

1. Taylor, § 478.

2. Brajaballav Ghose v. Akhoy Bagdi, 93 I.C. 115; 1926 C. 705.

3. See R. v. Scaife, 5 Cox 243.

Where a relation of the accused was examined by the prosecution before the committing Magistrate and personal recognizance was taken from him to appear before the Sessions Judge, and, when the case was tried by the Sessions Judge, the witness did not turn up and could not be found, it was held that his deposition before the committing Magistrate could be admitted at the trial under section 33, either because he could not be found, or because he was kept out of the way by the accused.⁴ The expression "the adverse party" is used in the section to distinguish that party from the party who calls the witness, and the distinction has nothing whatever to do with the nature of the evidence given by the witness. A party calling a witness does not become "the adverse party" because the witness gives evidence which favours the opposite party or is hostile to the party calling the witness.⁵

Unreasonable delay and expense.—The question of the reasonableness of the amount of delay or expense should be considered with reference to the circumstances of each case. It is impossible to lay down any hard and fast rule for the application of section 33 of the Evidence Act. Each case must depend upon its own facts, and the matter is essentially one for the exercise of discretion on the part of the trial Judge.⁶ The Judge has, however, to satisfy himself that the presence of the witness cannot be obtained without an unreasonable amount of delay or expense.⁷ It would be unreasonable to incur much delay or expense when the deposition sought to be admitted is of a formal nature or relates to facts as to which there is little or no dispute. On the other hand, it might be very reasonable to submit to much delay and considerable expense when the evidence of the deponent is vital to the success of the prosecution or has a very important bearing upon the guilt of the accused.⁸ When a witness is material, justice requires that he should, if possible, be examined at the trial in the presence of the accused. Where the evidence of the witness is not material, there is no need to introduce it under the provisions of section 33.⁹ In criminal cases in which the evidence of the witness is material,¹⁰ and of signal importance,¹¹ the provisions of this section should be resorted to only in extreme cases of delay and expense.¹² In a murder case the principal witness had joined the army and was at Muttra. It was held that any delay or expense which might be involved was insignificant as compared with the public interests involved in examining, in the box and in the presence of the Judge and the assessors, the principal witness upon so serious a charge.¹³ Where a person is accused of an offence under section 411, I.P. Code, the evidence of the alleged owner of the stolen property is of the utmost moment. In such a case, the presence of the alleged owner cannot be dispensed with on the ground that it would mean an expense of Rs. 500 to bring him to Court, and inconvenience to the witness is not at all a ground for the admission of a former deposition

4. *Abbas Mandal v. E.*, 131 I.C. 855. 1931 C. 473: 32 Cr. L.J. 810.

5. *Makhan Khan v. E.*, 1948 S. 122: P.L.D. 1949 S. 27.

6. *Jati Mali v. E.*, 57 C. 248: 125 I.C. 509. 1929 C. 765: 31 Cr. L.J. 857.

7. *Annavi Muthiriyar v. E.*, 39 M. 449: 28 I.C. 518: 16 Cr. L.J. 291.

8. *In re Pyari Lall*, 4 C.L.R. 504.

9. *Lakshman Totaram v. E.*, 31 I.C. 354: 16 Cr. L.J. 754: 17 Bom. L. R. 590.

10. *Lakshman Totaram v. E.*, 31 I.C. 354: 16 Cr. L.J. 754: 17 Bom. L. R. 590; *In re Pyari Lall*, 4 C.L.R. 504.

11. *Nga Nyo v. E.*, 1 R. 512: 76 I.C. 817: 1924 R. 209: 25 Cr. L.J. 257.

12. *Lakshman Totaram v. E.*, 31 I.C. 354: 16 Cr. L.J. 754: 17 Bom. L. R. 590; *E. v. Mulu*, 2 A. 646.

13. *In re S. Siluvai Antony Nadar*, 1944 M. 319: I.L.R., 1944 M. 687: 215 I.C. 242: 46 Cr. L.J. 85.

under section 33.¹⁴ If a case turns on a conversation between the prosecutor and the accused, it is of the highest importance that the evidence of the prosecutor should be heard by the jury.¹⁵ Where the charge against the prisoner is a serious one, the delay of an adjournment to the next Session is not in itself unreasonable and, unless there is anything of a special nature to stand in the way, the case should be adjourned to be duly tried on *viva voce* testimony,¹⁶ and warrant issued¹⁷ and further attempt made to enforce the attendance of the witness.¹⁸ If the witness has left his temporary residence, the authority serving the summons should look for him at his original place of residence.¹⁹ Where there is nothing to show either that the witness could not be found if reasonable exertion had been made to find him²⁰ or that the presence of the witness could not have been obtained without an unreasonable amount of delay or expense,²¹ the former deposition would not be admissible. A previous deposition cannot be admitted under this section if the delay or expense is not very great,²² or is trifling.²³ A fortnight's delay is not unreasonable.²⁴ The evidence of a witness in the committing Magistrate's Court cannot be transferred to the Sessions Court merely on the ground that it would be expensive to retain the assessors until he is served.²⁵ The fact that the witness has gone to a place not far away for purposes of training for a few days (a week) is not a sufficient ground to admit his deposition under this section.²⁶ But if the witness has left the country, it will be a proper ground for admitting his deposition in evidence.²⁷ When a witness migrates from one country to another and cannot be brought before the Court without (a week) is not a sufficient ground to admit his deposition under this section.²⁸ The mere fact that the witness has to come from Rangoon to Madras is not a sufficient reason for admitting his statement in evidence without examining him.²⁹ The expense contemplated by this section is the expense in obtaining the attendance of the particular witness³⁰ and the expense of adjourning the trial.³¹

Depositions in foreign country under the Fugitive Offenders Act.—
Evidence recorded in a foreign country under the Fugitive Offenders Act

14. Q.E. v. Burke, 6 A. 224.
15. Q.E. v. Jacob, 19 C. 113.
16. Q. v. Lukhan Santhal, 21 W.R. 56 Cr.
17. E. v. Nanhe Khan, 2 Cr. L.J. 518.
18. Dwarka Singh v. E., 74 I.C. 860; 1922 O. 254; 24 Cr. L.J. 828; E. v. Nanhe Khan, 2 Cr. L.J. 518; see Ghulam Haidar v. E., 10 L. 837; 116 I.C. 329; 1929 L. 542; 30 Cr. L.J. 623.
19. Q. v. Luckhy Narain Nagori, 24 W.R. 18 Cr.; Hari Prasad v. State, 1953 A. 660; 1953 Cr. L.J. 1496; 1953 A.L.J. 318.
20. Q. v. Luckhy Narain Nagori, 24 W.R. 18 Cr.
21. Noshai Mistri v. E., 5 C. 958.
22. Lakshman Totaram v. E., 31 I.C. 354; 16 Cr. L.J. 754; 17 Bom. L. R. 590.
23. E. v. Fateh Ali, (1881) A.W.N. 51; Lal v. E., 1943 L. 118; 207 I.C. 243.
24. In re Pyari Lall, 4 C.L.R. 504; see also Savlimiya Miyabhai v. E., 1944 B. 338; E. v. Gajendra Mohan Kar, 1943 C. 222; I.L.R. (1943) I.C. 405.
25. Lal v. E., 1943 L. 118; 207 I.C. 243.
26. Savlimiya Miyabhai v. E., 1944 B. 338.
27. Nga Ba On v. E., 104 I.C. 637; 1927 R. 248; 28 Cr. L.J. 861; Asiatic Steam Navigation Co. v. Bengal Coal Co., 35 C. 751.
28. Khadim Hussain v. Crown, 1950 L. 34; Gurdial Singh v. Crown, 1949 E.P. 228; 51 P.L.R. 74; 50 Cr. L.J. 568.
29. Kadappa Chetti v. Tirupathi Chetti, 86 I.C. 576; 1925 M. 444; but see J.G.G. Fernandes v. E., 1935 R. 484.
30. Raghubushana Tirthaswami v. Vidiavaridhi Tirthaswami, 34 I.C. 875; see In re Pvari Lall, 4 C.L.R. 504.
31. See In re Pvari Lall, 4 C.L.R. 504; Q. v. Lukhan Santhal, 21 W. R. 56 Cr.

may be admitted under this section at the trial of the fugitive in India.³²

The evidence must have been given in judicial proceedings or before a person authorized by law to take it.—Evidence sought to be admitted under the provisions of this section must have been given in judicial proceedings or before a person authorized by law to take it. "Judicial proceedings" include any proceeding in the course of which evidence is or may be legally taken on oath.³³ A proceeding before a Judge or a Magistrate who has no jurisdiction is not a judicial proceeding within the meaning of section 33 and, therefore, the evidence of a witness given in such proceeding is not admissible under the said section in a subsequent trial by a competent Court.³⁴ Where a Munsif, after the examination of a witness, returns the plaint on the ground that the value of the subject-matter is above his pecuniary jurisdiction, the evidence of the witness so examined will not be admissible in the subsequent trial before the Sub-Judge, even though the witness has died in the interval and so cannot be examined afresh.³⁵ Evidence recorded in the investigation of claims and objections under O. 21, r. 58, C. P. Code, is admissible in a suit under O. 21, r. 63, C.P. Code, to establish the right to the attached property, if the other requirements of this section have been complied with.³⁶ Revenue proceedings to ascertain who are the heirs of a deceased proprietor are not judicial proceedings,³⁷ nor proceedings before a Settlement Deputy Collector in a dispute in respect of the boundary between two villages for fiscal purposes.³⁸ Proceedings before a tribunal having no jurisdiction are not judicial proceedings within the purview of this section.³⁹

Persons authorized by law to take evidence.—If the evidence was given before a person authorized by law to take it, it is not necessary that the proceeding before him in which it was given should have been judicial.⁴⁰ The British Consul at Zanzibar is a person authorized to take evidence;⁴¹ so is a Commissioner appointed under the C.P. Code,⁴² or the Cr. P. Code.⁴³ A deposition taken on commission issued and executed under section 503—505, Criminal Procedure Code, is admissible in evidence at any subsequent stage of the same case before another Court;⁴⁴ it is admissible also in a different case if the other conditions of section 33 are satisfied. A Registrar making an inquiry under

32. *Wheeler v. E.*, 112 I.C. 673: 1928 S. 161: 29 Cr. L.J. 1089; as to the admissibility of evidence of the fugitive's own deposition during the extradition proceedings, see *E. v. Wheeler*, 112 I.C. 50: 1929 S. 15: 29 Cr. L.J. 962.

33. Section 4 (m), Cr. P. Code.

34. *State v. Sudhindra Nath Dutta*, 56 C.W.N. 835; *Abdul Mannan v. Crown*, P.L.D. 1954 Dacca 129; *Sankappa Rai v. Keraga Pujary*, 54 M. 561: 132 I.C. 122: 1931 M. 575; *Buta Singh v. E.*, 7 L. 396: 97 I.C. 752: 1926 L. 582: 27 Cr. L.J. 1168; *Rami Reddi & Seshu Reddi*, 3 M. 48.

35. *Sankappa Rai v. Keraga Pujary*, 54 M. 561: 132 I.C. 122: 1931 M. 575.

36. *Nga Seik v. Nga Pu*, 22 I.C. 676.

37. *Bayava Shiddappa Desai v. Parvateva Basavanappa Bellad*, 144 I.C.

442: 1933 B. 126

38. *Sri Krishna Dutt Dube v. Mst. Ahmadi Bibi*, 153 I.C. 708: 1935 A. 187.

39. *E. v. Ajit Kumar*, 1945 C. 159: 220 I.C. 237: 46 Cr. L.J. 692.

40. *Lanka Lakshmananna v. Lanka Varadhanamma*, 42 M. 103: 49 I.C. 638.

41. *E. v. Dassaji Ghulam Husein*, 3 B. 334.

42. O. 26, r. 16

43. Sections 503—505.

44. *Q.E. v. Ramachandra Govind Harshe*, 19 B. 749; see also clause (2) of section 507, Cr. P.C., which was enacted to remove the difficulty created by the decision in *Q.E. v. Jacob*, 19 C. 113, to the effect that evidence taken on commission issued by a committing Magistrate was not admissible in the trial before the High Court.

section 74 of the Registration Act as to the execution of a document,⁴⁵ or a District Registrar dealing with an appeal under section 72 of that Act,⁴⁶ or a Sub-Registrar holding an inquiry under section 41(2) of the same Act⁴⁷ on the presentation of a will, is a person legally authorized to take evidence; and, therefore, a deposition made in the course of such proceedings will be admissible in subsequent proceedings between the same parties, provided the other conditions of section 33 are satisfied. Under Act IV of 1871 and Act V of 1889, a Coroner has authority to take evidence. A Magistrate holding an inquest also has authority to take evidence.⁴⁸

Reasons to be stated for transfer of statement.—If a witness is not likely to be available without undue delay and expense, his statement might be transferred under section 33 by the Court. He might have been well advised to give fuller reasons for making the order transferring the statement. It appears that the learned Judge transferred it on the ground of unreasonable delay and expense and there is no infirmity in this order of transfer.⁴⁹

Evidence must have been given before a competent authority and taken in accordance with law.—Evidence given before a Judge or a Magistrate having no jurisdiction is not admissible under the provisions of this section in subsequent proceedings before a competent Court.⁵⁰ Though this section does not, like section 80, expressly so state, it seems to be implied that a previous deposition, in order to be admissible in subsequent proceedings, must have been taken and recorded in accordance with law; and, therefore, a deposition not so taken or recorded would be inadmissible.¹

PROVISO (1): IDENTITY OF PARTIES

Former proceeding in which evidence was given must have been between the parties to the subsequent proceeding or between the representatives in interest of such parties.—The scope and object and the language of this proviso have been authoritatively explained by the Privy Council in a judgment delivered by Lord Russell of Killowen. The Privy Council has differed from the interpretation that was put upon the terms of this proviso in some earlier decisions in India and by five Judges of the Madras High Court, who in its various stages dealt with the case which went in appeal to the Privy Council.² Proviso 1 to section 33 means "proceeding or between representatives in interest of the parties to the second proceeding." The proviso exactly inverts the requirements of the

45. *Jekali Sheik v. Taibannessa Bibi*, 20 I.C. 661: 18 C.W.N. 605.

46. *Muthu Goundan v. Pachaymmal*, 1943 M. 749.

47. *Lanka Lakshman v. Lanka Vardhanamma*, 42 M. 103: 49 I.C. 838.

48. Section 176, Cr. P. Code.

49. *Bakhshish Singh v. The State of Punjab*, 1958 S.C.R. 409: 1957 Cr. L.J. 1459. 1958 S.C.J. 106.

50. *Buta Singh v. E.*, 7 L. 396: 97 I.C. 752: 1926 L. 582: 27 Cr. L.J. 1168; *Rami Reddi and Seshu Reddi* 3 M. 48; *E. v. Ajit Kumar*, 1945 C. 159

(Magistrate's own appointment ultra vires).

1. See *E. v. Phagunia Bhuiyan*, 89 I. C. 1043: 1926 P. 58: 26 Cr. L.J. 1475. As to the mode of recording evidence in criminal cases, see Chap. XXV and Sections 503, 509, 512, 263 and 264, Cr. P.C.; as to the mode of recording evidence in civil cases, see O. 18, rr. 4—17 C. P. Code.

2. *Krishnayya Rao v. Raja of Pittapur*, 57 M. 1: 60 I.A. 336: 146 I.C. 216: 1933 P.C. 202.

English law which requires that the parties to the second proceeding should legally represent the parties to the first proceeding or be their privies in estate. The person who is called by the proviso a "representative in interest" of another is a person who was a party to the first proceeding. The proviso requires that the party to the first proceeding should have represented in interest the party to the second proceeding in relation to the questions in issue in the first proceeding to which "the fact which the evidence states" were relevant. It covers not only cases of privity in estate and succession of title, but also cases where both the following conditions exist, viz., (i) the interest of the relevant party to the second proceeding in the subject-matter of the first proceeding is consistent with and not antagonistic to the interest therein of the relevant party to the first proceeding, and (ii) the interest of both in the answer to be given to the particular question in issue in the first proceeding is identical. What section 33 intends is to allow the admission of evidence given in a former proceeding, which it is, for the specified reasons, impossible to give in a later proceeding, subject to the protection which the proviso affords to the party to the later proceeding against whom the evidence is tendered. What the first proviso aims at securing is that the evidence shall not be admitted unless the person who tested, or had the opportunity of testing, the evidence by cross-examination, either is himself, or represented the interests of, the party to the later proceeding against whom the evidence is tendered, i.e., that he was in the later case, in effect, fighting that person's battle as well as his own.³ According to this Privy Council decision, the first proviso is applicable not only to cases where the party to the first proceeding is the predecessor in interest of the party to the second proceeding in respect of the litigated right or question, but also to cases where the former represented the latter's interest, immediate or contingent. Thus, the proviso has been given a much wider scope, and, in view of this exposition of the proviso, several earlier cases in which the term "representative in interest" was held to mean only a "predecessor in interest" must be taken to have been wrongly decided. The test to determine whether a prior deposition is admissible in favour of a party is to see whether it would be admissible against him.⁴ The fact that a party to the subsequent proceeding had been wrongly made a party in the former proceeding in which the evidence was given does not affect the application of the section, provided he was in fact a party and had the right and opportunity of cross-examining the deceased witness.⁵ "It makes no difference that the parties are differently marshalled in the two proceedings, the plaintiffs in the first proceeding being defendants in the second, or vice versa; nor if there have been plurality of parties in the one case and not in the other."⁶ As thus stated, the rule comes to this, that if the party against whom a former deposition is sought to be given in evidence under this section was himself a party, or is, in the subsequent proceeding, the representative in interest of a party to the former proceeding, evidence given by a witness in the former proceeding will be admissible against him; and the fact that some more persons have been impleaded in the subsequent

3. *Krishnayya Rao v. Raia of Pittapur*, 57 M. 1: 60 I.A. 336: 145 I.C. 216: 1933 P.C. 202, reversing *Krishnayya Rao v. Raia of Pittapur*, 51 M. 893: 116 I.C. 673: 1928 M. 994 (F.B.) and *Krishna Surya Rao v. Raia of Chittapur*, 102 I.C. 713: 1927 M. 733: *Ganpatrao v. Nagorao*, 1940 N. 382.

4. *Krishnayya Rao v. Raja of Pitta-*

pur, 57 M. 1: 60 I.A. 336: 145 I.C. 216: 1933 P.C. 202.

5. *Gangaram v. E.*, 82 I.C. 715: 1925 N. 172: 25 Cr. L.J. 1355.

6. *Woodroffe. Ev.*, 9th Ed., 371, citing *Wright v. Doe D. Tatham*, I.A. & E. 3; but see *Hari Kishen v. Raghubar Daval*, 1 Luck. 489: 97 I.C. 853: 1926 O. 578.

proceeding or some persons who were parties to the former proceeding are not parties to the subsequent proceeding will be immaterial.⁷ It is also immaterial that in the subsequent proceeding the party is the plaintiff or prosecutor, whereas in the former proceeding he was the defendant or accused, and vice versa. But if a party to the subsequent proceeding was neither a party to the former proceeding nor is, in the subsequent proceeding, the representative in interest of a party to the former proceeding, this section will have no application and the evidence given by a witness in the former proceeding will be inadmissible.⁸ Where a murder was committed by six accused persons, but only five of them were tried and, at the trial, evidence was not expressly recorded under section 512, Cr. P. Code, against the sixth accused, who was absconding at the time of the trial, the depositions of the witnesses in the former trial were held inadmissible in the subsequent trial of the sixth accused, as he was not a party to the former trial and had no opportunity to cross-examine the witnesses.⁹ A deposition in a former proceeding is inadmissible against an accused person if he was not a party to the former proceeding¹⁰ but had appeared merely as a witness therein.¹¹ Statements of deceased witnesses as to the legitimacy of a claimant to certain property, made before Revenue Officer in a mutation case, are not admissible in a subsequent civil suit for that property by a person who was no party to the mutation case, but they will be admissible if the suit be by a person who was a party to the mutation case.¹² But where two civil suits, one by a person who was no party and the other by a person who was a party to the mutation case, are tried together, it would be more consonant with justice not to take into consideration in either suit the statements of witnesses recorded in the mutation proceedings.¹³ A party subsequently impleaded may adopt the evidence which was led before he was made a party,¹⁴ and where that is the case, depositions taken in his absence might become admissible against him in subsequent proceedings if the other conditions of the section are satisfied.

A purchaser of the equity of redemption is a representative in interest of the mortgagor within the meaning of this section.¹⁵ To decide whether the subsequent litigant is or is not the representative in interest of the former litigant, the interest involved in each case must be considered and shown to be the same or similar. Without having regard to the nature of the action, it is impossible to say whether a certain person is another's "representative in interest," for that very expression connotes and implies that the representation must be with reference to a particular title. The term "representative in interest" is a well known legal term and one can-

7. Hari Kishen v. Raghubar Dayal, 1 Luck. 489: 97 I.C. 853: 1926 O. 578.
8. Ayyavar Thevar v. Secretary of State, 1942 M. 528; Rup Kishor v. Patrani, 1927 A. 818.
9. Q. E. v. Ishri Singh, 8 A. 672.
10. Abdul Ghaffoor v. Govind Prasad, 117 I.C. 241: 1928 R. 284: 30 Cr. L.J. 736.
11. Kadhe Mal v. E., 42 A. 24: 52 I.C. 394: 20 Cr. L.J. 634; Rami Reddi & Seshu Reddi, 3 M. 48.
12. Mumtaz-un-Nisa Begam v. Wazir Ali, 65 I.C. 308: 1921 O. 242; see

- also Bayava Shiddappa Desai v. Parvateva Basavanappa Bellad, 144 I.C. 442: 1933 B. 126.
13. Mumtaz-un-Nisa Begam v. Wazir Ali, 65 I.C. 308: 1921 O. 242. As to the admissibility of statements in mutation proceedings, see the Privy Council decision in Dal Bahadur Singh v. Bijai Bahadur Singh, 52 A. 1: 57 I.A. 14: 122 I.C. 8: 1930 P.C. 79.
14. Rangasami Naidu v. Sundararajulu Naidu, 35 I.C. 52.
15. Ma Shwe La v. Mg Kyin, 26 I.C. 111.

not conceive of a representative in interest in the abstract.¹⁶ Where the former suit was brought by R, a Hindu, against M for possession of some property, on the ground that M was not a genuine son of R's father but a supposititious child fraudulently put forward, evidence recorded in the suit was held admissible in a subsequent suit brought by M against R's natural son who had been adopted by M's uncle's widow, on the ground that in the former suit R was the representative in interest of his son who would, in a joint Hindu family, take by birth.¹⁷ Where a statement made by an insolvent under section 27(1) of the Presidency Town Insolvency Act was given in evidence in a subsequent suit against the insolvent by the creditors, it was held that the statement was inadmissible under this section.¹⁸

To determine whether a person is the representative in interest of another regard must be had to the state of affairs at the time the evidence was given in the first suit; adopted son, whether representative of his natural father?—In determining whether a person is or is not the representative in interest of another, regard must be had to the state of affairs at the time when the evidence was given in the former proceedings.¹⁹ The question whether regard should be had also to the state of affairs existing at the time the deposition is tendered in evidence in the subsequent case is, in the existing state of authorities, not free from difficulty. The Madras High Court held that such state of affairs is an important, perhaps the determining, consideration;²⁰ but this Madras decision has been reversed by the Privy Council,²¹ and there are indications in this Privy Council decision that subsequent events would not cause the party in the first suit to cease to be a representative of the party to the second suit, if in the first suit the former did represent the latter's interest. Thus, if a Hindu coparcener was a party to the first suit, he will be taken to have represented his sons, born and unborn, and if any such son ceases to be a member of the coparcenary by his being adopted by someone after the first suit, the father will still be treated as his representative in interest for purposes of section 33 in a subsequent suit to which the adopted son as such is a party.²² If a party to the subsequent suit has purchased his interest from a person who, not being interested in the property, was merely an ostensible and not a real party to the former suit, but, having acquired interest in the property after the decision of the former suit, transferred it to the purchaser, evidence given in the former suit will be inadmissible against the purchaser, as, at the time the evidence was given, the ostensible party to the former suit was not the representative in interest of the purchaser.²³

16. Krishna Surya Rao v. Raja of Pittapur, 102 I.C. 713: 1927 M. 733. This decision was reversed by the Privy Council in Krishnayya Rao v. Raja of Pittapur, 57 M. 1: 60 I. A. 336: 145 I.C. 216: 1933 P.C. 202, but the Privy Council decision does not affect this part of the Madras judgment.

17. Krishnayya Rao v. Raja of Pittapur, 57 M. 1: 60 I. A. 336: 145 I.C. 216: 1933 P.C. 202.

18. Luchiram Motilal v. Rada Charan Poddar, 49 C. 93: 66 I.C. 15: 1922 C. 267.

19. See Sitanath Dass v. Mohesh

Chunder, 12 C. 627; see also Krishnayya Rao v. Raja of Pittapur, 57 M. 1: 60 I. A. 336: 145 I.C. 216: 1933 P.C. 202.

20. Krishnayya Rao v. Raja of Pittapur, 51 M. 893: 116 I.C. 673: 1928 M. 994 (F.B.).

21. Krishnayya Rao v. Raja of Pittapur, 57 M. 1: 60 I. A. 336: 145 I.C. 216: 1933 P.C. 202.

22. Krishnayya Rao v. Raja of Pittapur, 57 M. 1: 60 I. A. 336: 145 I.C. 216: 1933 P.C. 202.

23. Sitanath Dass v. Mohesh Chunder, 12 C. 627.

In some cases the question whether a person is or is not the representative in interest of another has been discussed with reference to the rule of *res judicata* enacted in section 11, C.P. Code,²⁴ but the Privy Council has observed that much assistance cannot be derived in considering this question from that point of view.²⁵

Former depositions admissible against and in favour of persons suing or being sued as partners, joint contractors, coparceners, legatees, or tenants-in-common; representative suits.—The vague expression “representative in interest” has not been defined in the Act; but whatever scope may be given to those words, they must at least include privies in estate. Partners and joint contractors are the agents of each other for the purpose of making admissions against each other in relation to partnership transactions or joint contracts and must be regarded as privies in estate.²⁶ The rule that evidence given as to a fact is admissible to prove the same fact in a later action between the same parties or their privies has been extended to cases where the interest of the parties to the second action were represented in the earlier one to which they were not parties, as, for instance, where a co-legatee or a tenant-in-common²⁷ or a coparcener²⁸ represented the interest of the other co-legatee tenants-in-common or coparceners. If the object of the former litigation was to advance a common claim,²⁹ or the litigation was a representative suit to which the sixth explanation to section 11, C. P., is applicable,³⁰ evidence given in it can be received under section 33 in a subsequent proceeding even against persons who were no parties to it. The principle of the English rule according to which, when there are several remainders limited by one deed, a judgment for or against one of them becomes evidence for or against the next in succession, may justify the use, under section 33 of the Evidence Act, of a former deposition in a suit brought against a Hindu widow, in a subsequent litigation against the reversioners.³¹ In a joint Hindu family, a coparcener acquires rights on and by birth. Therefore, the head of such family will, for purposes of section 33, be treated as the representative in interest of his sons, born and to be born; and subject to the other conditions of the section, a deposition in a suit to which the head was a party will be admissible in a subsequent suit to which a son born or not born at the time of the first suit is a party.³² An impartible **Raj**, though not subject to all the incidents of a joint Hindu family property, retains to some extent its character of joint family property, inasmuch as senior members of the family take such **Raj** by survivorship. Therefore, the in-

24. *Bayava Shiddappa Desai v. Parvateva Basavanappa Bellad*, 144 I. C. 442: 1933 B. 126; *Ramakrishna Pillai v. Tirunarayana Pillai*, 55 M. 40: 139 I.C. 684: 1932 M. 798.

25. *Krishnayya Rao v. Raja of Pittapur*, 57 M. 1: 60 I.A. 336: 145 I.C. 216: 1933 P.C. 202.

26. *Chandreswar Prasad Narain Singh v. Bisheshwar Protap Narain Singh*, 5 P. 777: 101 I.C. 289: 1927 P. 61.

27. *Krishna Surya Rao v. Raja of Pittapur*, 102 I.C. 713: 1927 M. 733; see the judgment of Kay, L.J., in *Printing Telegraph & Construction Co of the Agence Hevas v. Drucker*, (1894) 2 Q.B. 801.

28. *Krishnayya Rao v. Raja of Pittapur*, 57 M. 1: 60 I.A. 336: 145 I.C. 216: 1933 P.C. 202.

29. *Patinharkuru Vallaban Chattran Rajah Avergal v. Raman Varma*, 24 I.C. 519; see *Llanover v. Hemfrey*, (1882) 19 Ch. D. 224.

30. *Krishna Surya Rao v. Raja of Pittapur*, 102 I.C. 713: 1927 M. 733.

31. *Raj Kumari Debi v. Nriya Kali Debi*, 7 I.C. 892: 12 C.L.J. 434; but see *Lachmi Prosad Chowdhury v. Jagmohan Lal Chaubey*, 22 I.C. 594: 18 C.L.J. 633.

32. *Krishnayya Rao v. Raja of Pittapur*, 57 M. 1: 60 I.A. 336: 145 I.C. 216: 1933 P.C. 202;

cumbent of the Raj would be a representative in interest of his descendants who have a contingent right to succeed to the Raj by survivorship.³³

Explanation; depositions in criminal cases admissible in civil cases and vice versa.—"The explanation to the section is inserted for the purpose of excluding the objection which may arise, when the depositions are taken in criminal cases, that they cannot be used in a subsequent proceedings for want of mutuality, because the King is the prosecutor in all criminal proceedings".³⁴ The explanation declares that in a criminal case the parties to the proceeding are the prosecutor and the accused person, and that, therefore, a deposition given in a former criminal case between the prosecutor and the accused person is admissible in a subsequent civil proceeding between them. Similarly, evidence given in a civil proceeding, where the prosecutor and the accused of the subsequent criminal proceeding were arrayed as plaintiff and defendant, will be admissible as between them, if the other requirements of the section are satisfied. If the offence was taken cognizance of on the complaint of the person against whom the offence was committed, the person against whom the offence was committed would be the prosecutor within the meaning of the explanation, and thus a party to the proceedings within the meaning of the section, and the same would be the result if the complaint was made by another person at the instance of or on behalf of the person against whom the offence was committed.³⁵ Thus, where a complaint in respect of an offence of criminal trespass in the house of F was made by S against N, at the instance and on behalf of F, wherein S gave evidence, the deposition of S was admitted under section 33 in a subsequent suit by F against N under section 9 of the Specific Relief Act for possession of the house. F having been held to be the real prosecutor and, therefore, a party to the former criminal proceedings.³⁶ When an offence is taken cognizance of on police report and not on complaint,³⁷ the answer to the question who is the prosecutor must depend upon all the circumstances of the case. The mere setting of the law in motion by making a report to the police is not the only criterion: the conduct of the complainant before and after making the charge must also be taken into consideration. Nor is it enough to say that the prosecution was instituted and conducted by the police, as theoretically all prosecutions are conducted in the name and on behalf of the Crown, though in practice this is left in the hands of the person immediately aggrieved by the offence who, *pro hac vice* represents the Crown.³⁸ Where, in the prosecution of an accused person by a Court official for having forged a will, the deposition of a deceased witness in a former civil miscellaneous petition was given in evidence, it was held that neither the Crown nor the Court official prosecuting the accused having been a party to the former civil miscellaneous petition, the deposition of the deceased witness could not be admitted in evidence.³⁹ In a suit for compensation under Act III of 1855 by the sons of the deceased against the alleged murderers of the deceased the depositions of witnesses taken in the criminal trial which resulted in the conviction of the defendants are inadmissible,

33. *Krishnayya Rao v. Raia of Pittapur*, 57 M. 1: 60 I.A. 336: 145 I.C. 216: 1933 P.C. 202.

34. Woodroffe, *Ev.*, 9th Ed., 374.

35. See section 190 (1) (a), Cr. P. Code.

36. *Foolkissory Dassee v. Nobin Chunder Bhunjo*, 23 C. 441.

37. See section 190 (1) (b), Cr. P. Code.

38. *Gaya Prasad v. Bhagat Singh*, 30 A. 525: 35 I.A. 189 (P.C.); following in *Radhu Naik v. Dhadi Sahu*, 1953 Orissa 56.

39. *E. v. Waman Shivram Damle*, 27 B. 626.

as the criminal proceedings cannot be said to have been between the plaintiffs and the defendants.⁴⁰ But where the defendant of a former civil suit was prosecuted for having forged a receipt produced by him in that suit, and deposition of the deceased plaintiff in the civil suit was given in evidence against him at his trial, it was held that the deposition was admissible under the explanation to this section.⁴¹ It is illegal to bodily import in a civil case a deposition from a criminal case, unless the deponent is dead or otherwise incapable of giving evidence.⁴²

Depositions before the Coroner.—In proceedings before the Coroner, the accused may or may not be a party according to whether he is or is not suspected; but the Crown is not a party. Therefore, depositions taken by the Coroner are not admissible at the subsequent trial of the accused, even if the deponents have died or are not available to be examined.⁴³

PROVISO (2) : THE RIGHT AND OPPORTUNITY TO CROSS EXAMINE

Both the right and the opportunity to cross-examine must have co-existed.—Cross-examination is one of the most efficacious tests for the discovery of truth.⁴⁴ What section 33 intends is to allow the admission of evidence given in a former proceeding, which it is, for the specified reasons, impossible to give in a later proceeding, subject to the protection which the second proviso affords to the party to the later proceeding against whom the evidence is tendered. What the second proviso aims at securing is that the evidence shall not be admitted unless it was tested by cross-examination by the party or by his representative in interest.⁴⁵ In section 33 of the Evidence Act, which requires that the adverse party in the first proceeding had the right and the opportunity to cross-examine, the word “and” cannot be read as “or”. The true meaning of the section is that the adverse party had both the right and the opportunity of cross-examination.⁴⁶ Therefore, where the adverse party had the opportunity but not the right, or had the right but not the opportunity, or had neither the opportunity nor the right, to cross-examine the witness in the first proceeding, the deposition of the witness in the first proceeding will not be admissible in the subsequent proceeding.⁴⁷ But if the right to cross-examine existed and opportunity for cross-examination was offered but the party did not avail himself of this right and opportunity, the deposition would be clearly admissible.⁴⁸ The question whether the accused had the opportunity to cross-examine is a question of fact. The mere fact that the accused was present in police custody when a witness was examined without any previous notice does not mean that the accused was given reasonable opportunity to cross-examine.⁴⁹ What is contem-

40. *Bishen Das v. Ram Labhaya*, 106 P.R. 1915: 32 I.C. 18.

41. *Debi Singh v. E.*, 52 I.C. 385: 20 Cr. L.J. 625.

42. *Bal Gangadhar Tilak v. Shrinivas Pandit*, 39 B. 441: 42 I.A. 135: 29 I.C. 639: 1915 P.C. 7.

43. *E. v. Mahomed Yusuf*, 146 I.C. 544: 1933 B. 479: 35 Cr. L.J. 106.

44. See notes to section 137.

45. *Krishnayya Rao v. Raja of Pitta*, 92 I.C. 167: 1926 L. 310: 27 Cr. 216: 1933 P.C. 202.

46. *Dal Bahadur Singh v. Bijai Bahadur Singh*, 52 A. 1: 57 I.A. 14: 122 I.C. 8: 1930 P.C. 79.

47. *Sundara Rajali v. Gopala Thevan*, 150 I.C. 132: 1934 M. 100; *Bayava Shiddappa Desai v. Parvateva Basavenappa Bellad*, 144 I.C. 442: 1933 B. 126.

48. *Tahawar Ali Khan v. E.*, 1946 O. 26; *Gauri Dutt Marwari v. Dowing*, 13 P. 735: 151 I.C. 683: 1934 P. 413.

49. *Abdul Rahman v. E.*, 1946 L. 275.

plated by the section is an opportunity to cross-examine the witness and not an effective exercise of that right. It cannot be postulated that in every case where the accused is not represented by counsel and cannot submit the witness to a searching cross-examination, he had no opportunity to cross-examine the witness.⁵⁰

No right to cross-examine; statement made in an inquiry under section 476, Cr. P. Code; deposition taken before the framing of the charge in warrant cases, whether admissible if the witness not available for further cross-examination?—A person against whom proceedings have been instituted under section 476, Cr. P. Code, does not have the right to cross-examine the witness in the inquiry under that section. Therefore, statements of deceased witnesses recorded in the inquiry under section 476, Cr. P. Code, are inadmissible at the trial of a person which takes place as a result of the inquiry under section 476, Cr. P. Code.¹ In some cases² evidence recorded in the trial of a warrant case before the framing of the charge has been held to be admissible under this section if the witness is unavailable for cross-examination after the charge is framed, but in one case³ the Calcutta High Court has distinctly ruled that in a warrant case the accused has no right to cross-examine the prosecution witnesses until after the charge is framed, though the Magistrate in his discretion may allow him to do so, and that, therefore, the evidence of a prosecution witness examined in a case, tried as a warrant case, before the charge is framed, is not admissible in evidence against the accused under section 33 of the Evidence Act, when the case is subsequently tried by the Sessions Court. The Madras High Court has, however, differed from this view,⁴ and so have the Nagpur⁵ and the Allahabad High Courts.⁶

Witness dying before conclusion of cross-examination: admissibility of the deposition doubtful.—Where a witness dies or leaves the country after he has been examined-in-chief but before his cross-examination has been concluded, the deposition is admissible under this section, though its evidentiary value is little;⁷ but the Allahabad High Court on a consideration of the terms of section 33 and guided by an earlier ruling of the Calcutta High Court,⁸ entirely excludes from evidence such deposition, on the ground that in such cases it is open to a party to argue that a subsequent cross-examination of the witness might have destroyed to a great extent

50. Bora Narasimhulu, In re, 1951, 1 M.L.J. 478.

1. Bakir Saheb Amir Saheb v. E., 34 I.C. 969: 17 Cr. L.J. 249.

2. Mangal Sen v. E., 118 I.C. 647: 1929 L. 840: 30 Cr. L.J. 951; Nga Ba On v. E., 104 I.C. 637: 1927 R. 248: 28 Cr. L.J. 861; Lockley v. E., 43 M. 411: 55 I.C. 345: 21 Cr. L.J. 297; see also In re Muthiah Chetty, 81 I.C. 44: 1924 M. 735: 25 Cr. L.J. 556.

3. E. v. Mathews, 125 I.C. 281: 1929 C. 822: 31 Cr. L.J. 809; see also S.C. Mitter v. State, 1950 C. 435: 86 C.L.J. 21; Brahmachari Ajitananda v. Anath Bandhu Dutt, 1954 C. 395.

4. Muthiah Pillai v. E., 139 I.C. 203: 1932 M. 259: 33 Cr. L.J. 738.

5. Gurudi v. E., 154 I.C. 689: 1935

N. 8: 36 Cr. L.J. 578.

6. Rex v. Daya Shankar Jaitly, 1950 A. 167: 51 Cr. L.J. 571: 1950 A.L.J. 155; see also State v. Gajraj, 1953 Raj. 66: 1953 Cr. L.J. 577.

7. Diwan Singh v. E., 144 I.C. 331: 1933 L. 561: 34 Cr. L.J. 735; Maharaja of Kolhapur v. Sundarani Iyer, 48 M. 1: 93 I.C. 705: 1925 M. 497; Rosi v. Yadala Pillamma, 5 I.C. 512: 11 Cr. L.J. 145; Mangal Sen v. E., 1929 L. 840 (2): 118 I.C. 647; see also Ahmad Ali v. Joti Parshad, 1944 A. 188: I.L.R. 1944 A. 241; Mst. Horil Kuer v. Rajab Ali, 1936 P. 34: 160 I.C. 445.

8. Boisagomoff v. Nahapiet Jute Co., Ltd., 5 C.W.N. 230 (n); S. C. Mitter v. State, 1950 C. 435: 86 C.L.J. 21.

the effect of his evidence-in-chief.⁹ The Calcutta High Court has recently held that the opportunity to cross-examine required by the proviso is a full opportunity and not a partial one.¹⁰

Right and opportunity to cross-examine not utilised before the committing Magistrate: deposition admissible.—In an inquiry before the committing Magistrate, the accused has the right under section 208(2), Cr. P. Code, to cross-examine the prosecution witnesses and, on the maxim "*omnia praesumuntur rite esse acta*", the opportunity to cross-examine will be presumed to have been offered to him.¹¹ If the record of the inquiry shows that the witness was not cross-examined but does not show that the opportunity to cross-examine was denied, the presumption will be that the accused was given the opportunity to cross-examine and that he declined to avail himself of it.¹² It is the duty of the Court to bring to the notice of the defence that it is their duty to cross-examine the witness after he has been examined.¹³ If the opportunity to cross-examine was offered, the deposition will not be rendered inadmissible because the accused did not avail himself of it.¹⁴

One of the requirements for application of section 33 is that the adverse party in a proceeding should have the right and opportunity to cross-examine. It does not say that the opportunity should have been availed of or the right should have been exercised. If opportunity for cross-examination was offered, but the party did not avail himself of the right and opportunity, the deposition would be clearly admissible. Once the evidence is admissible what weight should be attached to that evidence is a different matter and must necessarily depend upon other facts and circumstances of the case. To say that the evidence of such a witness, who was not cross-examined in spite of the right and opportunity being there, should not be accepted without due corroboration, is to import into section 33 a limitation which is not there.¹⁵

Cross-examination reserved, witness dying before cross-examination: deposition whether admissible?—Witnesses have to be first examined and then (if the adverse party so desires) cross-examined.¹⁶ The proper time for the cross-examination of a witness is immediately after he has been examined-in-chief, and the practice of deferring the cross-examination of the prosecution witnesses until they have been all examined-in-chief is a procedure not contemplated by the Criminal Procedure Code.¹⁷ The phrase "cross-examination reserved" is quite familiar to the practitioners in criminal Courts, though there is no provision in the Criminal Procedure

9. Narsingh Das v. Gokul Prasad, 50 A. 113: 107 I.C. 243: 1928 A. 140.

10. S. C. Mitter v. State, 1950 C. 435: 86 C.L.J. 21.

11. Tafiz Pramanik v. E., 125 I.C. 743: 1930 C. 228: 31 Cr. L.J. 916; R. v. Peacock, 12 Cox C. C. 21; but see Q. v. Nawjan alias Nane Khan, 20 W.R. 69 Cr., where it has been remarked that the record of the proceeding must show that an opportunity was presented to the prisoner of cross-examining the witness; for observation to the same effect, see Ibrahim v. E., 18 I.C. 406: 14 Cr. L.J. 70.

12. Tafiz Pramanik v. E., 125 I.C. 743: 1930 C. 228: 31 Cr. L.J. 916; but

see State v. Ramani Mohan Chanda, 1953 Assam 176: 1953 Cr. L.J. 1593.

13. Ibrahim v. E., 18 I.C. 406: 14 Cr. L.J. 70.

14. Tafiz Pramanik v. E., 125 I.C. 743: 1930 C. 228: 31 Cr. L.J. 916; Azimuddy v. E., 101 I.C. 661: 1927 C. 398: 28 Cr. L.J. 485; Q. E. v. Basvanta, 25 B. 168; Gauri Dutt Marwari v. Dowring, 13 P. 735: 151 I.C. 683: 1934 P. 413.

15. Chintamani Das v. State, A.I.R. 1970 Orissa 100.

16. Section 138.

17. Tombi v. E., 44 I.C. 343: 19 Cr. L.J. 327.

Code for reserving cross-examination to a later stage. Where, however, the Court has expressly allowed the cross-examination of a witness to be reserved, it seems that the evidence of the witness will not be considered to have been concluded and it is doubtful whether such incomplete deposition would be admissible under this section if the witness died before being actually cross-examined.¹⁸ The Calcutta High Court has remarked that, having regard to the practice of not cross-examining the prosecution witnesses during the committing Magistrate is of doubtful admissibility and of little evidentiary value, particularly where the record does not show that the accused was asked to cross-examine the witness.¹⁹

Right and opportunity to cross-examine witnesses implied in proceedings before an officer authorized to take evidence.—Where the law authorizes an officer to take evidence, e.g., in an inquiry under section 41(2) of the Registration Act, and provides that the parties may appear by counsel but does not expressly provide for the examination and cross-examination of witnesses, both the right and the opportunity to cross-examine will be implied and the depositions of witnesses in any proceeding before such officer will be admissible in subsequent proceedings between the parties as to the same matter, if the witnesses are dead or not available for examination in the subsequent proceedings.²⁰ The fact that a witness was cross-examined by the Registrar in an inquiry under section 74 of the Registration Act is sufficient to make the evidence admissible under this section.²¹

Depositions taken on commission admissible.—In civil as well as in criminal cases, evidence may be taken on commission.²² The proviso does not require proof of the presence of the cross-examining party or his agent before the Commissioner and in such cases the “opportunity to cross-examine should be deemed to include the opportunity to cross-examine the witness by cross-interrogatories.”²³ If, however, a commission be executed without any notice, or without sufficient notice, to the opposite party to enable him, if he pleases, to put cross-interrogatories, the deposition will be rejected.²⁴ Where a commission is not issued in the form of interrogatories in writing and the witness is examined by the party, who applied for his examination by commission, in person, the admissibility of the deposition will depend on whether or not the adverse party had notice and the means to arrange for the cross-examination of the witness. There may be circumstances where, although a prisoner has the right, he has not the opportunity, to cross-examine, e.g., where the witness is at a great distance and the prisoner cannot go to the place or is too poor to employ a pleader or too unfamiliar with the ways of the place to get legal help there.²⁵ Thus, where a witness

18. *E. v. Mahrab*, 120 I.C. 524: 1930 S. 54: 31 Cr. L.J. 121.

19. *Ibrahim v. E.*, 18 I.C. 406: 14 Cr. L.J. 70; but see *Tafiz Pramanik v. E.*, 125 I.C. 743: 1930 C. 228: 31 Cr. L.J. 916; *Azimuddy v. E.*, 101 I.C. 661: 1927 C. 398: 28 Cr. L.J. 485; *Q. E. v. Basvanta*, 25 B. 168.

20. *Lanka Lakshmana v. Lanka Verdhannamma*, 42 M. 103: 49 I.C. 638; as to the power of a Revenue Officer to take evidence in mutation proceedings, see *Mumtaz-un-Nisa*

Begum v. Wazir Ali, 65 I.C. 308: 1921 O. 242.

21. *Jekali Sheikh v. Taibannessa Bibi*, 20 I.C. 661: 18 C.W.N. 605.

22. O. 26, r. 16, C.P. Code; sections 503—505 Cr. P. Code.

23. See *Q.E. v. Ramchandra Govind Harshe*, 19 B. 749; *Narayana Bharatigal v. Ittull Amma*, 39 I.C. 893.

24. Woodroffe, E., 9th Ed., 371.

25. See *Q.E. v. Ramachandra Govind Harshe*, 19 B. 749.

was examined in the preliminary inquiry on commission and the position of the accused did not permit him to arrange for the cross-examination of the witness, the statement of the witness, on this ground and others, was held inadmissible under this section.²⁶

Evidence recorded in lunacy proceedings.—The evidence of an expert recorded in proceedings under the Lunacy Act, to which, the parties to the subsequent suit were parties and had examined and cross-examined the expert on the question of the lunacy of a person, are admissible under section 33 in the subsequent suit in which an issue as to that person's lunacy is raised²⁷ if the expert is not available as a witness.

Evidence given in ex parte proceedings or in the absence of a party.—Evidence given in ex parte proceedings against a person who was not served with process prior to the granting of the ex parte decree is inadmissible under this section.²⁸ Similarly, evidence recorded in the absence of the accused, where no express order under section 512, Cr. P.C. was made, is inadmissible at the subsequent trial of the accused.²⁹ But where proceedings are taken under section 512 of the Code of Criminal Procedure evidence recorded in a previous trial would be treated as evidence against the absconding accused, notwithstanding the fact that he had no opportunity to cross-examine the witnesses at the time the evidence was recorded.³⁰ The evidence of witnesses on the record of another judicial proceeding to which the accused was not a party cannot be brought on the record under this section.³¹ Section 33 is inapplicable to evidence recorded before a person is added as a defendant, but the objection to the inadmissibility of such evidence will not be allowed to be raised for the first time in second appeal.³² Though the case last cited says that section 33 is inapplicable to evidence recorded before a person is impleaded as a party, it is submitted that a subsequently added party has the right and opportunity of recalling the witnesses examined in his absence and of cross-examining them, and, therefore, the proviso will be deemed to have been satisfied where the subsequently added party does not recall the witnesses examined before he was made a party, and the evidence will be admissible against him in a subsequent proceeding if the witnesses are not available.

A former deposition is inadmissible if it was not read over to the witness.—Section 33 does not apply to a statement made before an inquiring Magistrate if it was not read over the deponent in the manner required by section 360, Cr. P. Code, inasmuch as, unless evidence is recorded in the manner prescribed in Ch. XXV, Cr. P. Code, and the statement properly verified under section 360 of that Code, the defence cannot be considered to have had an opportunity of cross examination.³³

In a de novo trial depositions of dead witnesses may be admitted under section 33.—The general provisions of section 33 are in no way affected by section 350, Cr. P. Code. Under section 350, Cr. P. Code, on

26. *Q.E. v. Burke*, 6 A. 224.

27. *Mahant Rai v. Lachhmina Kunwar*, 101 I.C. 363: 1927 P.C. 123.

28. *Rajmangal Misir v. Mathura Dubain*, 38 A. 1: 30 I.C. 576.

29. *Q.E. v. Ishri Singh*, 6 A. 672.

30. *State v. Bhimaraya*, 1953 Hvd. 63.

31. *Abdul Gaffoor v. Govind Prasad*, 117 I.C. 241: 1928 R. 284: 30 Cr. L.J. 736.

32. *Rangasami Naidu v. Sundarayajulu Naidu*, 35 I.C. 52.

33. *E. v. Phagunia Bhuian*, 89 I.C. 1043: 1926 P. 58: 26 Cr. L.J. 1475; see, however, as to this irregularity, the Privy Council decision in *Abdul Rahman v. E.*, 5 R. 53: 54 I.A. 96: 100 I.C. 227: 1927 P.C. 44.

the transfer of a case, the duty of the Court to resummon the witnesses for a trial *de novo* at the request of the accused extends only to resummoning the witnesses that are available. Therefore, where, on a trial *de novo* in consequence of a transfer, the Court, finding that a witness is dead, gets his evidence in the first judicial proceeding proved under section 33 and resummons the other witnesses, the procedure adopted is strictly in accordance with law.³⁴

Right and opportunity of cross-examination in mutation proceedings.—In an Oudh case, decided under the Land Revenue Act of that province, it has been held that a Revenue Officer is authorized to take evidence on oath.³⁵ If this view is correct, then in a proceeding before a Revenue Officer the parties have the right, and may be presumed to have the opportunity, to cross-examine the witnesses examined in those proceedings.³⁶ But the issues in a mutation proceeding are not necessarily the same as in a subsequent civil suit on the same cause of action and, therefore, both the right and the opportunity to cross-examine are much more limited in the former than in the latter. Thus, where in a mutation case cross-examination on irrelevant matters has “filtered through” the objection taken to its relevancy, the statement made by a witness in the mutation proceedings will not be admissible under this section in a subsequent civil suit as to the same matter.³⁷ The Bombay High Court has held that in revenue proceedings to ascertain the heir to a deceased proprietor there is no such right to cross-examine as would make the present section applicable.³⁸

Existence of an opportunity to cross-examine, if not admitted, must be proved.—The fact that the accused had full opportunity to cross-examine, if not admitted, must be proved.³⁹ If the deposition was taken in the presence of the prisoner, there is, in England, a presumption that he had full opportunity to cross-examine;⁴⁰ but this presumption may be rebutted by proof of the prisoner’s insanity, or by proof of the deponent’s illness rendering him unfit for cross-examination, or by proof that the notice to cross-examine was so short that the prisoner had no time to instruct a solicitor.⁴¹

Statements in affidavits are inadmissible.—This section does not apply to the statement of a dead man contained in an affidavit, as the adverse party has ordinarily neither the right nor the opportunity to cross-examine the person making the affidavit.⁴²

34. *Lekhal v. E.*, 8 L. 570: 101 I.C. 483: 1927 L. 332: 28 Cr. L.J. 451; *Muthiah Pillai v. E.*, 139 I.C. 203: 1932 M. 559: 33 Cr. L.J. 738.

35. *Mumtaz-un-Nisa Begam v. Wazir Ali*, 65 I.C. 308: 1921 O. 242.

36. See *Lanka Lakshman v. Lanka Vardhanamma*, 42 M. 103: 49 I.C. 638.

37. See on this point the Privy Council decision in *Dal Bahadur Singh v. Bejai Bahadur Singh*, 52 A. 1: 57 I.A. 14: 122 I.C. 8: 1930 P.C. 79; cited under the heading “questions in mutation proceedings whether the same as in a subsequent civil suit” in the notes to

proviso (3); see also *Mumtaz-un-Nisa Begam v. Wazir Ali*, 65 I.C. 306: 1921 O. 242.

38. *Bayava Shiddappa Desai v. Parvateva Basavanappa Bellad*, 144 I. C. 442: 1933 B. 126.

39. *Q. E. v. Ramchandra Govind Harshe*, 19 B. 749; *Q. v. Nawjan alias Nane Khan*, 20 W.R. 69 Cr.

40. *R. v. Peacock*, 12 Cox 21; see also *Bora Narasimhulu*, in re, 1951, 1 M.L.J. 478.

41. *Phipson, Ev.*, 7th Ed., 488.

42. *Daraiswami Ayyar v. Balasundaram Iyer*, 102 I.C. 243: 1927 M. 507.

Evidence produced by a defendant in the first proceeding is inadmissible against his co-defendant.—One defendant has, ordinarily, no right or opportunity to cross-examine the witnesses produced by another defendant and, therefore, depositions of the deceased witnesses of one defendant are not admissible in subsequent proceedings against the other defendants. Similarly, a party has no right or opportunity to cross-examine his own witnesses,⁴³ and it seems that the evidence given in a former proceeding by the witnesses of a party will, in a subsequent proceeding, be inadmissible against the party on whose behalf the witnesses appeared in the first proceeding. Thus, where in proceedings under section 145, Cr. P. Code, U appeared as a witness for the first party, his deposition was, in a subsequent proceeding in which the first party was a defendant, held inadmissible against the first party.⁴⁴

PROVISO (3) : IDENTITY OF ISSUES

Principle.—Although the Act, in using the word “questions” in the plural seems to imply that, to render the former deposition admissible, it is essential that all the questions must be the same in both the proceedings, that is not the intention of the law. The principle involved in requiring identity of the matter in issue is to secure that in the former proceeding the parties were not without the opportunity of examining and cross-examining to the very point upon which their evidence is adduced in the subsequent proceeding. And though separate proceedings may involve issues, of which some only are common to both, the evidence to those common issues given in the former proceeding may, on the conditions mentioned in section 33 arising, be given in the subsequent proceedings.⁴⁵ Thus if, in a dispute respecting lands, any fact comes directly in issue, the testimony given to that fact is admissible to prove the same point in another action between the same parties or their privies, though the last suit relates to other lands.⁴⁶ Where R charged A with breach of trust, but A being acquitted, R was tried for making a false charge, it was held that the depositions given by witnesses in the first case could be used under this section against R in the second case, as at least one question, namely, whether there had been breach of trust, was common to both the cases, and the fact that in the second case there was an additional issue made no difference.⁴⁷ What the proviso requires is that the questions in issue in the first proceeding should have been substantially the same as in the subsequent proceeding, though it is not necessary that a specific issue should have been raised regarding any particular matter in issue between the parties.⁴⁸ A good test of the applicability of the proviso is whether the same evidence is applicable to both the proceedings, although different consequences may follow from the same act.⁴⁹ In the proceedings before a Magistrate on a charge of causing grievous hurt to a person, some witnesses, one of whom was the person assaulted, were examined on behalf of the prosecution. The prisoners were committed for trial. Subsequently, the person assaulted died in consequences of the injuries inflicted on him. At the trial before the

43. Section 154.

44. *Brajaballav Ghose v Akhoy Bagdi*, 93 I.C. 115: 1926 C. 705.

45. *Rani Reddi & Seshu Reddi*, 3 M. 48; *Krishnayya Rao v. Raja of Pittapur*, 57 M. 1: 60 I.A. 336: 145 I.C. 216: 1953 P.C. 202.

46. *Taylor*, § 436; *Rami Reddi & Seshu Reddi*, 3 M. 48.

47. *Rami Reddi & Seshu Reddi*, 3 M. 48.

48. *Chandikamba v. Viswanathamaya*, (1939) 1 M.L.J. 227.

49. *E. v. Rochia Mohato*, 7 C. 42.

Sessions Judge, charges of murder and of culpable homicide not amounting to murder were added to the charge of grievous hurt. The deposition of the deceased witness was put in and read at the Sessions trial. It was held that the evidence was admissible both under section 32(1) and section 33 of the Evidence Act, notwithstanding the additional charges before the Sessions Court, as the evidence to prove the act with which the accused was charged remained precisely the same, though the gravity of the offence became presumptively increased.⁵⁰ The questions involved in a prosecution for criminal trespass and a suit under section 9 of the Specific Relief Act against the trespasser for recovery of possession of the property trespassed upon are substantially the same, and the evidence given in the former is admissible in the latter if the other conditions of section 33 are satisfied.¹ Statements of deceased witnesses, made in a prosecution of the accused for dacoity, are not admissible in his prosecution for an offence under the Arms Act² committed on a different date.

Questions in mutation proceedings are not necessarily the same as in a subsequent civil suit.—Mutation disputes are to be decided on the basis of possession, and if the mutation officer is unable to satisfy himself on this point, he has to ascertain by a summary inquiry as to which of the parties is best entitled to the property.³ Where a Hindu widow adopted a son, professing to do so in exercise of a power given to her by her deceased husband, and in the mutation proceedings consequent upon such adoption made a statement that she had adopted a person and that her husband had given her the power to adopt, but the opposing reversioners were not allowed to fully cross-examine the widow with regard to the creation of the power to adopt, the Privy Council, in a suit by the reversioners to avoid the adoption for want of authority to adopt, held the statement of the widow to be inadmissible under this section, on the ground that the question as to the power to adopt was not in issue in the mutation proceedings and that the reversioners did not have full opportunity to cross-examine the widow on that point.⁴

Evidence recorded in a suit to contest a notice of ejectment, whether admissible in subsequent civil suit?—Evidence recorded in a suit in a revenue Court to challenge a notice of ejectment is not admissible in a subsequent civil suit between the tenant and the landlord for recovery of possession of occupancy tenancy.⁵

Deposition made before a sub-Registrar in an inquiry under section 41(2) of the Registration Act is admissible in a subsequent civil suit relating to the genuineness of the will.—The issue before a Sub-Registrar making an inquiry under section 41(2) of the Registration Act on the

50. *E. v. Rochia Mohato*, 7 C. 42.

1. *Foolkissary Dassee v. Nobin Chunder Bhunjo*, 23 C. 441.

2. *Nga Tha Ku v. E.*, 36 I.C. 480: 17 Cr. L.J. 512.

3. *Dal Bahadur Singh v. Bijai Bahadur Singh*, 52 A. 1: 57 I.A. 14: 122 I.C. 8: 1930 P.C. 79.

4. *Dal Bahadur Singh v. Bijai Bahadur Singh*, 52 A. 1: 57 I.A. 14: 122 I.C. 8: 1930 P.C. 79; the question whether the issue in mutation proceedings was the same as in a subsequent civil suit was not decided

in *Mumtaz-un-Nisa Begam v. Wazir Ali*, 65 I.C. 308: 1921 O. 242.

5. *Saru Khan v. Jan Muhammad*, 106 I.C. 313: 1928 L. 43. It does not appear from the report of the case to appear from the report of the case to be inadmissible on the ground of absence of identity of issues or on the ground that there was nothing to show that the witnesses were dead or not available. *Contra* *Special Manager, Court of Wards Balrampur v. Tribeni Prasad*, 1933 O. 289: 154 I.C. 965.

presentation of a will is the same as in a subsequent civil suit in which the genuineness of the will is called in question, and, therefore, depositions made before the Sub-Registrar are admissible in the civil suit, provided the witnesses are dead and the other party had an opportunity of cross-examining them in the inquiry.⁶

A deposition admitted under section 33 constitutes substantive evidence; admissibility of a previous deposition under some other provisions of the law.—When a previous deposition is admitted under section 33, it becomes substantive evidence in the case, inasmuch as the section declares it to be relevant for the purpose of proving the truth of the facts which it states. A previous deposition may also be used, as an admission, against the deponent in his lifetime, and even without his being examined in the case to which he is a party,⁷ as well as against his successor in interest; or as a dying declaration under section 32(1); or as a declaration as to a public right or custom under section 32(4); or under section 288 Cr. P. Code, if the deponent has been examined at the Sessions trial.⁸ In each of the aforesaid cases, the deposition, when duly proved, constitutes substantive evidence, i.e., evidence of the truth of the matters which it states. A previous deposition is a previous statement and may, therefore, be legitimately used for purposes for which previous statements are generally used. For instance, if the deponent is examined as a witness in a subsequent proceeding, his previous deposition may be used under section 157 to corroborate his testimony, or under sections 155 and 145 to impeach his credit,⁹ or under section 159 to refresh his memory; but used as such, a previous deposition does not become substantive evidence, i.e., it cannot be used as evidence of the fact which it states, and is admissible only for the limited purpose specified by the section which authorizes its admission.¹⁰ A deposition may, however, become substantive evidence when it is used to refresh a witness's memory in the manner contemplated by section 160 of the Act.¹¹

Mode of proof of a deposition.—Where evidence is required by law to be reduced to writing,¹² the writing itself or a certified copy of it¹³ must be produced, as oral evidence in such a case is excluded by section 91 of the Act. "But where the law either does not require the statements

6. Lanka Lakshman v. Lanka Vardhanamma, 42 M. 103: 49 I.C. 638.

7. Brajaballav Ghose v. Akhoy Bagdi, 93 I.C. 115: 1926 C. 705: Ali Mohammad Khan v. Maharaj Bepari, 64 I.C. 266: 36 C.L.J. 185: Soojan Bibee v. Achmut Ali, 21 W.R. 414; in Mohammad Khan v. Mst. Fattan, 12 P.L.R. 1919, the dependent was a party to the subsequent suit, but the admission of her previous deposition would have amounted to admitting in evidence an admission in her own favour; see, section 21, ante.

8. See In re Kottammal Kolathingal Ummar Hajee, 46 M. 117: 69 I.C. 636: 1923 M. 32: 23 Cr. L.J. 748.

9. In re Kottammal Kolathingal Ummar Hajee, 46 M. 117: 69 I.C. 636:

1923 M. 32: 23 Cr. L.J. 748: Hus-saina v. Sahib Nur, 7 I.C. 505.

10. As to whether a previous statement constitutes substantive evidence, see Niamat Khan v. E. 127 I.C. 850: 1930 L. 409: 32 Cr. L.J. 51; Bishen Datt v. E., 105 I.C. 677: 1927 A. 705: 28 Cr. L.J. 965; E. v. Cherath Choyi Kutti, 26 M. 191.

11. See Partab Singh v. E., 7 L. 91: 92 I.C. 167: 1926 L. 310: 27 Cr. L.J. 215; Kapur Singh v. E., 123 I.C. 120: 1930 L. 450: 31 Cr. L.J. 75.

12. See O. 16, r. 21 and O. 18, r. 5, C.P.C. and sections 356, 360, 362 364 and 503, Cr. P. Code.

13. Section 77; Chandreswar Prasad v. Bisheshwar Pratap, 5 P. 777: 101 I.C. 289: 1927 P. 61.

of witnesses to be reduced to writing¹⁴ or merely requires the substance of the evidence of witnesses,¹⁵ or of witnesses and parties called as witnesses to be recorded, in the first of these cases certainly, and it would seem also in the second,¹⁶ oral evidence of such statements as had not been recorded would be admissible under this section.¹⁷ Where oral evidence as to a deposition becomes admissible, the deposition may, like any other statement, be proved by examining as a witness a person to or before whom it was made, or any other person who heard it, and in such a case notes taken at the time it was made would also be admissible, under sections 159 and 160 of the Act, to refresh the witness's memory. The Privy Council has held that the heading of a deposition in which the name, age, residence, etc., of the witness are stated is only descriptive of the witness and does not form part of the evidence given by him on solemn affirmation;¹⁸ and the Calcutta High Court has held in a case that a certified copy of the deposition of a witness would not come in by itself and that it is necessary to adduce evidence proving the identity of the person who made the deposition.¹⁹ It is, however, submitted that in law there being a presumption against fraud and impersonation, the identity of the deponent may be presumed under section 114 and section 80 of the Act.²⁰ Extracts from the previous deposition, contained in the judgment in the proceeding in which the deposition was made, are not the right kind of proof of the deposition.²¹ See Notes to section 80 under the heading "Is there any presumption under section 80 as to the identity of the deponent or the confessor?"

Use of incomplete evidence.—In a suit on the original side of the Calcutta High Court where trial remained incomplete due to the death of the Judge, on both parties inviting his successor to use evidence already recorded it was held that such evidence is admissible.²²

Credit of a deceased deponent may be confirmed or impeached like that of an ordinary witness.—When a previous deposition is used as evidence under section 33, any other statement made by the deponent may

14. Section 263, Cr. P. Code.

15. Sections 264 and 355, Cr. P. Code.

16. Woodroffe, Ev., 9th Ed., 366.

17. Woodroffe, Ev., 9th Ed., 366.

18. Maqboolan v. Ahmad Hussain, 26 A. 108; 31 I.A. 38 (P.C.), followed in Lukhan Chandra Mandal v. Takim Dhali, 80 I.C. 357; 1924 C. 558; see also Ma Tin v. M. E. Nyun, 1938 R. 81. It seems that if the witness is sworn or affirmed, as it is sometimes done, before the witness is asked his name, age, residence, etc., the "descriptive part" of the deposition might form part of the evidence given by the witness on oath or solemn affirmation, see Jadunath Singh v. Bisheshar Singh, 1939 O. 17.

19. Brajballav Ghose v. Akhoy Bagdi, 93 I.C. 115; 1926 C. 705. A similar view was also taken in Bhagwat Prasad v. Sher Khan, 94 I.C.

985; 1926 O. 489 and Q. E. v. Durga Sonar, 11 C. 580.

20. For cases on an analogous point, see Gopaldas v. Sri Thakrji, 194' P.C. 83; E. v. Surajbali, 56 A. 750; 1934 A. 340; E. v. Samiruddin, 8 C. 211; Reg v. Fata Adaji, 11 Bom. H.C. 247; Panchu Das v. E., 34 C. 698, notes to section 32 (1) under the heading "how dying declarations should be proved," and notes to section 80 under the heading. "Is there any presumption under section 80 as to the identity of the deponent or the confessor."

21. Nanduri Saradamba v. Parkala Pattabhiramayya, 53 M. 952; 129 I.C. 463; 1931 M. 207; Medavarapu Narasayya v. Medavarapu Veerayya, 151 I.C. 753; 1935 M. 268.

22. Dalun Kumar v. Nandorani, 73 C.W.N. 877.

be used, by virtue of section 158 of the Evidence Act, for the purpose of contradicting the deponent, as if the deponent had appeared in Court, was cross-examined on the statement, and had denied the facts mentioned in the same.²³ Similarly, any previous statement made by such person may be used for the purpose of corroborating his previous deposition.²⁴

Section 33 of the Evidence Act and Section 288 of the Criminal Procedure Code.—The conditions of section 33 of the Evidence Act must be completely satisfied before the Sessions Court can take on record the committal Court deposition of a witness who is not produced before it. Section 288 Cr. P.C. has no application to such a case. When a witness examined on behalf of the prosecution in the Court of the Committing Magistrate is not produced in the Sessions Court, and the prosecution seeks to bring his deposition in the committal court on the record of the case, it is the duty of the Sessions Court to see whether the conditions of section 33 of the Evidence Act are duly satisfied. For that purpose, the Court is bound to inquire of the prosecution the reason for which it finds itself unable to produce that person as a witness, and it can take such deposition on record only when, as a result of such inquiry, it is satisfied that the efforts had in fact been made to trace the witness and yet he could not be found. Section 288 Cr. P.C. has no application whatever to such a case, because that section comes into operation only when a witness is produced and examined in the Sessions Court and the question of bringing on record his deposition in the lower Court arises for the purpose of contradicting his evidence in the Sessions Court. If, in any case, the High Court finds that a Sessions Judge has taken the deposition of an important witness in the committal Court on the record of the Sessions trial, in violation of the provisions of section 33 and purporting to act in the exercise of his powers under section 288 of the Code, the High Court would be quite justified if it sends the case back to the Sessions Court for a retrial after recording the evidence of such witness or after recording the reasons why he could not be examined as a witness.²⁵

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES

34. Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

Illustration

A sues B for Rs. 1,000, and shows entries in his account books showing B to be indebted to him to this amount. The entries are relevant, but are not sufficient, without other evidence, to prove the debt.

23. *Niamat Khan v. E.*, 127 I.C. 850: 1930 L. 409: 32 L.J. 51.

24. See section 158.

25. *Bihari Singh Madho Singh v. State of Bihar*, 1954 Cr. L.J. 1742.

26. Cf. section 240 of the Indian Companies Act, 1913 (7 of 1913), and

Sch. 1, Order VII, rule 17 of the Code of Civil Procedure, 1908 (Act 5 of 1908). As to admissibility in evidence of certified copies of entries in Bankers' books, see section 4 of the Bankers' Books Evidence Act, 1891 (18 of 1891).

COMMENTARY

Principle.—If an entry is against the interest of the person in whose books it occurs, it is relevant as an admission under section 21, even if the book is not regularly kept in the ordinary course of business; but if the entry is in favour of such person, then, according to the general rule which excludes admissions in one's own favour, it is inadmissible,²⁷ unless it is given in evidence after his death, in which case it will become admissible under section 32(2). As the present section makes entries in regularly kept books of account admissible in favour of a person even in his lifetime, it must be treated as an exception to the general rule enacted in section 21 that a man cannot make evidence for himself.²⁸ The section seeks to avoid the dangerous consequences of admitting this self-serving kind of evidence by declaring that the entries cannot be used against other persons as sufficient evidence of liability.

What is a book of account?—So that an entry may be relevant under this section, it must be shown that (i) the entry is in a book, (ii) the book is a book of account, and (iii) the book of account is regularly kept in the course of business. In section 34, the word “book” signifies a collection of sheets of paper bound together with the intention that such binding shall be permanent and the papers used collectively in one volume. Unbound sheets of paper in whatever quantity, though filled up with one continuous account, are not a “book of account.” Loose sheets of paper containing accounts have no probative force of a book of account regularly kept.²⁹ To account is to reckon, and it is not possible to conceive any accounting which does not involve either addition or subtraction or both of these operations of arithmetic. A book which contains successive entries of item may be a good memorandum book, but until those entries are totalled or balanced or both, as the case may be, there is no reckoning and consequently no accounting. The Legislature did not intend to include in the category of “books of account” any record in which there is no process of reckoning. Therefore a book which merely contains entries of items of which no account is made at any time is not a “book of account” for the purposes of section 34.³⁰

“Regularly kept in the course of business”; the system according to which accounts are kept affects their value and not their admissibility, **conemporaneous.** **personal knowledge of the entrant.**—The expression “regularly kept” does not mean “correctly kept”;³¹ it means that the accounts in the books are kept according to a set of rules or system.³² If books are kept in pursuance of some continuous and uniform practice in the current routine of the business of the particular person to whom they belong, they are “books of account regularly kept in the course of

27. Section 21.

28. *Uttam Chand Ishar Das v. Mohammad Sharif*, 137 I.C. 44: 1932 L. 417.

29. *Ganesh Prasad Roy v. Narendra Nath Sen*, 1953 S.C. 431: 17 Cut. L.T. 73.

30. *Mukundram v. Dayaram*, 23 I.C. 893; see also *Ambalavana Pillai v. Gouri Ammal*, 1936 M. 871.

31. *Gulab Halwai v. Bhagwan Dass*, 138 I.C. 716: 1932 O. 225; *Kesheo Rao v. Ganesh*, 95 I.C. 128: 1926 N. 407.

32. *Gulab Halwai v. Bhagwan Dass*, 138 I.C. 716: 1932 O. 225; *Kesheo Rao v. Ganesh*, 95 I.C. 128: 1926 N. 407; *Chandi Ram Deka v. Jami-ni Kanta Deka*, 1952 Assam 92.

business." The system, however, need not necessarily be an elaborate or a reliable one. Even the roughest memoranda of accounts, kept generally according to the most elementary system, are admissible.³⁴ From the point of view of admissibility alone, section 34 makes no difference between the cash books and ledgers of a large bank and the day-book of a house-keeper.³⁵ But the evidentiary value of the books would largely depend upon their formality and the checks against fraud secured by the method of keeping them.^{35a} The degree of excellence of the system of keeping accounts and the closeness with which that system has been followed would affect the weight of the evidence of an entry, not its admissibility.³⁶ Merely because *bahis* are not so regularly kept as one would expect from people who carry on very large business is no ground for rejecting them.³⁷ It is not necessary that the entries in the books should have been made from day to day or from hour to hour as transactions took place. The time of making the entries may affect the value of them but should not, if they have been made afterwards regularly in the course of business, make them irrelevant.³⁸ Accounts prepared from rough books or memoranda should be treated as original accounts,³⁹ and cannot be rejected on the ground that they were not entered regularly from day to day.⁴⁰ It is not necessary that the accounts be totalled every day.⁴¹ But a book in which calculations are made in a haphazard way for varying periods of time is not a book regularly kept in the course of business.⁴² A day-book, which has been entered after four months from the happening of an event and the rough notes of which are not available, is not a document which can be held to have been kept in the regular course of business. These remarks apply *a fortiori* to the ledger which is prepared from such a day-book.⁴³ Accounts written up casually once a week or a fortnight, though admissible, do not possess the same claim to confidence that attaches to books entered from day to day or from hour to hour as transactions take place.⁴⁴ Accounts prepared from

33. Ramchand Pitambhardas v. E., 19 I.C. 534: 14 Cr. L.J. 262; Pannalal v. Labhchand, 1955 M.B. 49.
34. Kesheo Rao v. Ganesh, 95 I.C. 128: 1926 N. 407.
35. Mukundram v. Dayaram, 23 I.C. 893.
- 35a. Mukundram v. Dayaram, 23 I.C. 893; Ramchand Pitambhardas v. E., 19 I.C. 534: 14 Cr. L.J. 262.
36. Kesheo Rao v. Ganesh, 95 I.C. 128: 1926 N. 407.
37. Khushi Ram v. Mehr Chand, 1950 Punj. 272.
38. Deputy Commissioner of Bara Banki v. Ram Parshad, 27 C. 118: 26 I.A. 254 (P.C.); Kesheo Rao v. Ganesh 95, I.C. 128: 1926 N. 407; Chandreswar Prasad v. Bisheshwar Pratap, 5 P. 777: 101 I.C. 289: 1927 P. 61; Nanilal Das v. Nut-behari Das, 38 C.W.N. 861; Ram-kumar Janarayan v. Pyarchand Meerchand, 1952 M.B. 55.
39. Peary Mohan Mukerjee v. Narendra Nath Mukerjee, 32 C. 582. 9 C.W.N. 421; see also Kesheo Rao v. Ganesh, 95 I.C. 128: 1926 N. 407; Maung Sit Kon v. Ma Sa Ya. 42 I.C. 117.
40. Mandal Prasad v. Mandir Das, 11 I.C. 95.
41. Narayan v. Waman, 59 I.C. 121: 1921 N. 133.
42. Jasodabai v. Dharamdas Thawerdas, 142 I.C. 271: 1932 S. 186.
43. Arjan Singh Bhajan Singh v. Surjan Singh Acharaj Singh, 155 I.C. 1006: 1935 Pesh. 44.
44. Bankey Behari Lal v. Brij Behari Lal, 51 A. 519: 116 I.C. 285: 1929 A. 170; Kesheo Rao v. Ganesh, 95 I.C. 128: 1926 N. 407; Hingu Miya v. Heramba Chandra Chakravarti, 8 I.C. 81: 13 C.L.J. 139; see Mun-chershaw Bezonji v. New Dhurumsey Spinning & Weaving Co., 4 B. 576, where such accounts were held entirely inadmissible. This ruling was, however, disapproved by the Privy Council in Deputy Commissioner of Bara Banki v. Ram Prashad, 27 C. 118: 26 I.A. 254 (P.C.).

memory or inadequate materials possess little evidentiary value.⁴⁵ It is not necessary to show that the person making or dictating the entries had personal knowledge of the fact stated, provided the entry was made in a book of account regularly kept in the course of business. The question whether the person making or dictating the entry had personal knowledge of the fact stated affects the value, and not the admissibility, of the entry.⁴⁶ Books which are not regularly kept are not admissible under this section.⁴⁷ If a book of account is not admissible under section 34 by reason of its not having been regularly kept, it may be admissible as an entry or memorandum under section 32(2), if the writer of the book is dead.⁴⁸ Books and papers of a limited company kept in the usual course of business are best evidence.⁴⁹

In applying the general principle of Regularity of Entry different circumstances may come into question,—the kind of occupation, the kind of book, the kind of item⁵⁰

Incorrect entries in the books.—The fact that there are incorrect entries and mistakes in an account book, provided it is kept in the ordinary course of business, does not make it irrelevant, though this fact will affect its evidentiary value.¹ But the books are sufficiently discredited, if they are shown to contain bogus entries,² or unexplained blanks.³

Formal proof of the fact that the books have been regularly kept in the course of business, whether necessary?—An entry in an account book is an admission by the maker thereof in his own favour, and it is accepted as evidence only if it strictly complies with the requirement of being kept regularly and in the ordinary course of business.⁴ It is essential in every case, where reliance is placed upon books of account, to establish that they have been regularly kept in the ordinary course of business⁵. If the fact of regular maintenance and general accuracy of the books is not admitted, it must be formally proved.⁶ Where the writer of a book of account is alive but is not examined as a witness the book cannot be said to have been duly proved, and is inadmissible.⁷ The proper procedure to follow is to call the clerk who has kept the accounts, or some person competent to speak to their genuineness, to prove that the

45. *Rajagopala Naidu v. Subhammal*, 51 M. 291: 109 I.C. 153: 1928 M. 180.

46. *Reg. v. Hanmanta*, 1 B. 610.

47. *Vithoo Punjabi v. Thakurdas Kunjilal*, 1949 N. 414: I.L.R. 1949 N. 307: 1949 N.L.J. 398.

48. *Babhnaji v. Ratanlal*, 148 I.C. 1033: 1934 N. 106.

49. *Lodna Colliery Co. v. Bholanath Rai*, 1954 C. 233.

50. *Wigmore*, Vol. 2 S. 1546, P. 1905, *Ramaji v. Manohar*, 62 Bom. L.R. 322.

1. *Gulab Halwai v. Bhagwan Dass*, 138 I.C. 716: 1932 O. 225; see *Kesheo Rao v. Ganesh*, 95 I.C. 128: 1926 N. 407.

2. *Maganmal v. Darbarilal*, 107 I.C. 113: 1928 P.C. 39.

3. *Charan Das v. Lal Chand*, 41 P. L.R. 295.

4. *Uttam Chand Ishar Das v. Mohammad Sharif*, 137 I.C. 44: 1932 L. 417; *Bankey Behari Lal v. Brij Behari Lal*, 51 A. 519: 116 I.C. 285: 1929 A. 170; *Hingu Miya v. Heramba Chandra Chakravarti*, 8 I.C. 81: 13 C.L.J. 139.

5. *Abdul Haq v. Shivji Ram Khem Chand*, 71 I.C. 259: 1922 L. 338; *Imamhandi v. Matasuddi*, 13 I.C. 678: 15 C.L.J. 621.

6. *Mukundram v. Dayaram*, 23 I.C. 893.

7. *Gajendra Shah v. Shankar Baksh Singh*, 152 I.C. 468: 1935 O. 16; *Lachmi Narain v. Musaddi Lal*, 1942 O. 155.

books have been regularly kept and that they are generally accurate.⁸ In a case, however, the Allahabad High Court has held that formal proof of the fact that the books have been regularly kept in the course of business is not necessary and that it is a matter of intrinsic evidence whether the books are books of account and regularly kept in the course of business.⁹ If the accounts are in the form of a memorandum not regularly kept in the course of business, they are not evidence by themselves but can be used to corroborate the testimony of the person who kept them or to refresh the memory of such person when examined as a witness.¹⁰ If the account book was written by a person who is dead, any objection to its admissibility on the ground that it was not regularly kept must be taken in the trial Court.¹¹

Evidentiary function of the entries; entries relevant but not sufficient to charge a person with liability.—Under the old Act, entries in books proved to have been kept in the course of business were admissible only as “corroborative” and not as “independent” proof of the facts therein stated.¹² If, therefore, there was no other evidence of the fact stated in the entries, the entries were inadmissible, there being nothing to corroborate. The language of the present Act, however, is materially different from the language of the old Act and implies a substantial alteration in the law.¹³ The present Act does not say that an entry is merely corroborative evidence; the entry is substantive evidence, though, by itself, it is not sufficient to charge a person with liability.¹⁴ Expressions such as “corroborative evidence”, “independent evidence”, and substantive evidence” which occur in some of the reported decisions bearing upon section 34 of the present Act¹⁵ are a survival of the phraseology of the old Act and are misnomers. Under the present Act, the entries are admissible whether they are corroborated or not or whether they are given in evidence to charge a person with liability or to prove any other relevant fact. It is not correct to say that the entries are not admissible unless corroborated. The only limitation imposed by the section on the evidentiary function of the entries is that, when they are sought to be used for a particular purpose, namely, to charge any person with liability, they shall not alone be sufficient. This limitation on their evidentiary function does not, however, affect their general admissibility.¹⁶ Suppose, for instance a question arises whether a person was on a particular date in Calcutta. Evidence is adduced to show that in a book of account regularly kept in the course of business there is an entry that he

8. *Dwarka Doss v. Jankee Doss*, 6 M. I.A. 88 (P.C.); *Hingu Miya v. Heramba Chandra Chakravarti*, 8 I.C. 81.

9. *E. v. Narbada Prasad*, 51 A. 864: 121 I.C. 819: 1930 A. 38: 31 Cr. L.J. 36.

10. *Keyarsosp v. Garbad*, 120 I.C. 224: 1930 N. 24.

11. *In re Madu Chinnagi Reddi*, 32 I.C. 665: 17 Cr. L.J. 73; see also *Chakravarthi Nainar v. Pushpavathi Ammal*, 95 I.C. 1005: 1926 M.A. 985.

12. See Section 43 of Act 11 of 1855.

13. *Gopeswar Sen v. Bijoy Chand Mahatab Bahadur*, 55 C. 1167: 108 I.C. 883: 1928 C. 854, per Mukerji,

J.; *E. v. Narbada Prasad*, 51 A. 864: 121 I.C. 819: 1930 A. 38: 31 Cr. L.J. 36; *Belget Khan v. Rash Beharee Mookerjee*, 22 W.R. 549.

14. *Yesuvadiyan v. Subba Naicker*, 52 I.C. 704.

15. See *Deonarayan Singh v. Dwarka Prasad Singh*, 109 I.C. 136: 1928 P. 429; *Jonab Biswas v. Siva Kumari Debi*, 104 I.C. 733: 1927 C. 855; *Faijaddin v. Agni Kumar Sarma*, 71 I.C. 300: 1924 C. 370.

16. *Gopeswar Sen v. Bijoy Chand Mahatab Bahadur*, 55 C. 1167: 108 I.C. 883: 1928 C. 854; see also *Yesuvadiyan v. Subba Naicker*, 52 I.C. 704.

received a sum of money from X in Calcutta on that date. That entry would be admissible under the first part of section 34, and apparently no corroboration would be needed as no liability is sought to be imposed upon him by virtue of that entry.¹⁷ Similarly, where an entry in a book of account is given in evidence not to charge a person with liability but to prove any other relevant fact in the case, e-g., to prove the rate of rent paid by a tenant with a view to rebut the presumption under section 50 of the Bengal Tenancy Act, the uncorroborated entry will be admissible.¹⁸ When an entry is used to show variation in the rent, it is not used to charge a person with liability;¹⁹ there is, therefore, nothing to prevent a Court, if it so likes, to treat the entry as sufficient proof of the fact mentioned in the entry, namely, the rate of rent paid by the tenant,²⁰ even if the ultimate result of the proof of variation in the rent may be to impose on the tenant the liability of paying enhanced rent. An entry in a book of account is relevant to prove the rate at which the defendant had been paying for water used.²¹ An entry in a book of account may also be used to corroborate the testimony of other witnesses deposing to the fact mentioned in it.²² No presumption of correctness attaches to the entries in the *bahis*.²³

Account-books, as such, do not create any right, and any entry in the account-books cannot be the basis of charging a person with the liability of what is noted against him. Entries in the account-books can be merely evidence of certain alleged facts and, as such, are relevant evidence. Certain entries which might be signed by a constituent may form the basis of a charge against him in view of his acknowledging his liability and the correctness of the contents noted in that entry.²⁴

The rule contained in the section applies only to entries in books of original entry, e.g., as in cash books or *Rokar Bahis*. But not to a ledger or *Khata Bahi*, which, though a book of accounts and kept in the regular course of business, is not a book of original entry. No reliance should be placed on the entries in the *Khata Bahi* which are not supported by corresponding entries in the *Rokar Bahi* or *Naqal Bahi*.²⁵

17. *Aktowli v. Tarak Nath Ghose*, 17 I.C. 266: 16 C.L.J. 328.

18. *Gopeswar Sen v. Bijoy Chand Mahatab Bahadur*, 55 C. 1167: 108 I.C. 883: 1928 C. 854; *Nirod Krishna Ghose v. Produt Kumar Tagore*, 32 I.C. 794; *Dukha Mandal v. Grant*, 16 I.C. 467: 16 C.L.J. 24; *Belaet Khan v. Rash Beharee Mookerjee*, 22 W.R. 549; but see *Aktowli v. Tarak Nath Ghose*, 17 I.C. 266: 16 C.L.J. 328; *Surnomoyi v. Johur Mahomed Nasyo*, 10 C.L.R. 545.

19. *Gopeswar Sen v. Bijoy Chand Mahatab Bahadur*, 55 C. 1167: 108 I.C. 883: 1928 C. 854; *Nirod Krishna Ghose v. Product Kumar Tagore*, 32 I.C. 794; *Dukha Mandal v. Grant*, 16 I.C. 467: 16 C.L.J. 24; *Belaet Khan v. Rash Beharee Mookerjee*, 22 W.R. 549; but see *Aktowli v. Tarak Nath Ghose*,

17 I.C. 266: 16 C.L.J. 328; *Surnomoyi v. Johur Mahomed Nasyo*, 10 C.L.R. 545.

20. See, however, *Deonarayan Singh v. Dwarka Prasad Singh*, 109 I.C. 136: 1928 P. 429; *Jonab Biswas v. Siva Kumari Debi*, 104 I.C. 733: 1927 C. 855; *Faijaddin v. Agni Kumar Sarma*, 71 I.C. 300: 1924 C. 370, where corroboration seems to have been required as a matter of law.

21. *Prabhu Diyal v. Ram Chunder*, 1923 L. 595.

22. *Lal Mohan Saha v. Tazimaddin*, 49 I.C. 756.

23. *Ahmad Din Allah Ditta v. Partap Singh*, 41 P.L.R. 373: 1939 L. 433.

24. *Hari Prasad v. State*, 1953 A. 660: 1953 Cr. L.J. 1496: 1953 A.L.J. 318.

25. *Sohanlal v. Gulab Chand*, I.L.R. 1965 Raj. 1035.

But this section is not the only provision to be considered. There is section 11, which provides that facts not otherwise relevant are relevant, if they are inconsistent with any fact in issue or relevant fact. So, where a fact in issue in a case is whether a certain sum of money was paid, that fact is a relevant fact. Absence of entries in the account books would be inconsistent with the receipt of the amount and would thus be a relevant fact which can be proved under section 11.²⁶

Corroboration.—When an entry is used to charge a person with liability, corroboration is necessary.²⁷ The law does not require any particular form of corroborative evidence, and it is impossible to lay down any hard and fast rule as to the kind of corroborative evidence which should be produced.²⁸ What the section requires is that the entry should not stand alone; there must be some other evidence to support it.²⁹

Account books regularly kept in course of business may be proved but should be corroborated.—Entries of account books are not by themselves sufficient to charge any person with liability. Therefore, when A sues B for a sum of money, it is open to him to put his account books in evidence, provided they are regularly kept in the course of business and show by reference to them that the account claimed by him is debited against B. The entry though made by A in his own account books, and though it is in his own favour is a piece of evidence which the court may take into consideration for the purposes of determining whether the amount referred to therein was in fact paid by A to B. The entry by itself is of no help to A in his claim against B but it can be considered by the Court alongwith the evidence of A for drawing the conclusion that the amount was paid by A to B.³⁰

Each item in the books must be proved.—There is no presumption of correctness attaching to the entries in a book of account.³² A mere account book, without more, does not prove anything. Mere proof of the existence of certain entries in books of account kept in the ordinary course of business is not sufficient to charge a person with liability;³² nor is a mere assertion that particular pages of certain volumes were written by this or that writer sufficient compliance with the provision of the law. The books must be proved item by item for the purpose of charging the opposite party. The law requires proof not only of account

26. *State of Andhra Pradesh v. Ganeswara*, A.I. 1963 S.C. 1850.

27. *Narain Das v. Ghazi Ram Gojar Mal*, 1938 A.L.J. 449; 1938 A.W.R. (H.C.) 294; *Khuda Baksh Nur Iahi v. Yasin*, 1937 Pesh. 103; *Khunni Mal-Narain Das v. Dwarka Das Baij Nath*, 128 I.C. 767; 1930 A. 710; *Beni v. Bisan Dayal*, 89 I.C. 371; 1925 N. 445; *Jodha Mal Budha Mal v. Ditta*, 84 I.C. 909; 1925 L. 242; *Rani v. Bahadur Mal Buti Mal*, 63 I.C. 946; 1922 L. 119; *Abdul Ali v. Puran Mal*, 82 P.R. 1914; 25 I.C. 560.

28. *Yesuvadiyan v. Subba Naicker*, 52 I.C. 704.

29. *Faiz Mohammad Pir Baksh v. Muhammad Zaman Khan*, 157 I.

C. 52; *E. v. Narbada Prasad*, 51 A. 864; 121 I.C. 819; 1930 A. 38; 31 Cr. L.J. 36; *State v. Kishan Dayal*, 1952 H.P. 46; 1952 Cr. L. J. 1128.

30. *State of Andhra Pradesh v. Ganeswara Rao*, A.I.R. (1963) 2 Cr. L.J. 671; (1964) 2 S.C.A. 38.

31. *Ahmad Din Allah Ditta v. Partap Singh*, 51 P.L.R. 373; 1939 L. 438.

32. *T. N. S. Firm v. P. S. Muhammad Hussain*, 146 I.C. 608; 1933 M. 756; *Mathila Sice v. Gaebale*, 96 I.C. 429; 1926 M. 955; *Yesuvadiyan v. Subba Naicker*, 52 I.C. 704; *State v. Kishan Dayal*, 1952 H.P. 46; 1952 Cr. L.J. 1128; *Duni Chand v. Munshi Amar Nath*, 1953 H.P. 68.

books generally but of each item that is in the interests of the person producing the books.³³ In order to obtain a decree on the basis of entries in books of account, it is not sufficient merely to prove that the books are correct and have been regularly kept in the course of the business; the entries must also be proved.³⁴ A general statement by the plaintiff that there were dealings between him and the defendant is not sufficient evidence of any particular item charged against the defendant³⁵ But it has been remarked in *Hawanta v. Akbar Khan*,³⁶ that where there is the plaintiff's statement on oath that the account is correct, disputed items interspersed in an otherwise true account should not be disallowed simply because no specific evidence is adduced in regard to them.

Writer must be examined.—Where the writer of the account books is alive and has not been examined, the account books may be said not to be duly proved.³⁷

The nature of corroborative evidence.—Section 34 of the Evidence Act does not in any way limit the nature of the material upon which the Court may rely to support the entries in a book of account. Such material may be in the shape of temporary vouchers, receipts or other documentary evidence. It may take the shape of sworn oral testimony. The circumstances surrounding the existence of the book and the circumstances surrounding the transaction which is recorded in the book may constitute sufficient corroborative material³⁸ Any relevant fact which is evidence within the meaning of the Evidence Act may be treated as sufficient corroboration.³⁹ if, in addition to the production by the plaintiff of account books regularly kept in the course of business, there is evidence of witnesses who prove a number of items claimed by the plaintiff, the requirements of section 34 are fulfilled and there is sufficient evidence to charge the defendant with liability.⁴⁰

What would amount to independent evidence sufficient to corroborate the entries in the account books depends upon the facts of each case and particularly on the issues between the parties. What is necessary to be seen in each case is whether besides the entries in the account books, there is any evidence to prove that the transactions referred to in those entries actually took place. Where the transactions sued upon are numerous and extend over some length of time, it is hardly reasonable to expect independent evidence to be given to prove each and every particular transaction. In such cases the genuineness of the account books, if

33. *Banwari Lal v. Mst. Hussaini*, 1939 L. 455; *Mathila Sice v. Gaebale*, 96 I.C. 429: 1926 M. 955; *Ganeshi Lal v. Mangat Ram Atma Ram*, 76 I.C. 157: 1924 L. 540; *Abdul Haq v. Shivji Ram-Khem Chand*, 71 I.C. 259: 1922 L. 338; *Ganga Ram v. Kaka Ram*, 22 I.C. 403; *Imambandi v. Mutasuddi*, 13 I.C. 678: 15 C.L.J. 621.

34. *Bahadur Singh v. Padam Chand Asa Ram*, 141 I.C. 655: 1933 L. 384.

35. *Buta v. Tirlok Chand*, 100 I.C. 862: 1927 L. 903.

36. *Hanwanta v. Akbar Khan*, 80 P.

R. 1910: 7 I.C. 1011; see also *Ramgobind Prasad v. Gulabchand Sahu*, 1941 P. 430: 20 P. 273.

37. *Kaka Ram v. Thakar Das*, A.I.R. 1962 Punj. 27.

38. *Kalu Mal Dhakhan Lal v. Bhawani Dass-Rakhab Das* 88 I.C. 383: 1925 A. 742.

39. *Narain Das v. Ghazi Ram Gojar Mal*, 1938 A.L.J. 449: 1938 A.W. R. (H.C.) 294; *Yesuvadiyan v. Subba Naicker*, 52 L.C. 704. The word "evidence" in this ruling seems to have been used in a wider sense than in section 3.

40. *Nanak Chand v. Parmeshri Das*, 35 P.L.R. 539.

they are regularly kept in the course of business, will be the determining factor. But mere proof of the correctness of the entries in the account books is not enough. There must be some evidence to corroborate those entries. Such corroboration is best afforded by the evidence of the person who wrote the account books and in whose presence the transactions took place. He need not prove each and every particular transaction. If he proves the entries written by him and states that the transactions referred to in those entries actually took place in his presence or to his knowledge, the effect will substantially be the same. But in case of dispute in respect of particular items, specific evidence should be insisted upon to prove those particular transactions.⁴¹

Plaintiff's own statement, whether sufficient corroboration?—A general statement by the plaintiff that the books speak for themselves⁴² is insufficient, as the plaintiff's statement in such a case is not independent of the entries in the books, and the law requires evidence independent of the entries to corroborate them.⁴³ It is, however, equally clear that if the plaintiff deposes from his personal knowledge and does not merely state the inference which he has drawn from the books, the requirement of the law is complied with and his statement, if believed, would be sufficient corroboration.⁴⁴ Where the examination-in-chief of the plaintiff does not make it clear whether he is speaking from his personal knowledge or merely from the state of affairs disclosed by the books, and no question is put to him in cross-examination to show that he is not speaking from his personal knowledge the statement of the plaintiff should be interpreted in the manner most favourable to him, and he should be held to have spoken from personal knowledge.⁴⁵ If, however, a party has the means of producing better evidence, it is clearly his duty to produce it,⁴⁶ and in such a case a general statement by the party that the books speak for themselves,⁴⁷ or that the items in the books are correct,⁴⁸ or that there were dealings between him and the other party,⁴⁹ is not sufficient. The statement of a book-keeper who makes daily balances each day is insufficient if the actual items were not paid in his

41. Ramgobind Prasad v. Gulabchand Sahu, 1941 P. 430: 20 P. 273: 196 I.C. 57.

42. Ganga Ram v. Kaka Ram, 22 I.C. 403; see also Ganga Prasad v. Inderjit Singh, 23 W.R. 390 (P.C.).

43. Q. v. Hurdeep Sahay, 23 W.R. 27 Cr.

44. Jodha Mal Budha Mal v. Ditta, 84 I.C. 909: 1925 L. 242; Yesuwadiyan v. Subba Naicker, 52 I.C. 704; Hanwanta v. Akbar Khan, 80 P.R. 1910: 7 I.C. 1011; Sharaf Husain v. Ram Kishen Das, 68 P.R. 1899: 5 P.L.R. 1900: see Suraj Prasad v. Mt. Makhna Devi, 1946 A. 127; Khuda Baksh Nur Ilahi v. Yasin, 1937 Pesh. 103; Dwarka Das v. Sant Baksh, 18 A. 92; Gopasundar Sabatho v. Chunilal, 1955 Orissa 6.

45. Mukhi Ram v. Firm Kamla Prasad Balamdas, 161 I.C. 164: 1937

P. 222; Dwarka Das v. Sant Baksh, 18 A. 92; Har Dei v. Sri Kishun, 133 I.C. 900: 1932 A. 60; Jagat Singh v. Jagat Singh Kawa-tra & Sons, 145 I.C. 157: 1933 L. 212; Yesuvadiyan v. Subba Naicker, 52 I.C. 704.

46. Ganga Persad v. Inderjit Singh, 23 W.R. 390 (P.C.); Hira Bhagat v. Gobind Ram, 63 P.R. 1897; Ganga Ram v. Kaka Ram, 22 I.C. 403; see also Buta v. Tirlok Chand, 100 I.C. 862: 1927 L. 903.

47. Ganga Ram v. Kaka Ram, 22 I.C. 403; see also Abdul Ali v. Puran Mal, 32 P.R. 1914: 25 I.C. 460.

48. Ganga Prasad v. Indrajit Singh, 23 W.R. 390 (P.C.).

49. Buta v. Tirlok Chand, 100 I.C. 862: 1927 L. 903; Ganeshi Lal v. Mangat Ram Atma Ram, 76 I.C. 157: 1924

presence.⁵⁰ Where accounts are prepared by a book-keeper from memoranda supplied by the plaintiff, the statement of the book-keeper is not sufficient, and the plaintiff must himself go into the witness-box to support the accounts.¹ A book-keeper may testify to facts recorded by him in books regularly kept in the course of business if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.² But such evidence can hardly be considered as sufficient independent corroboration of the entries.

Absence of entry of a fact which, in the usual course, should have been recorded in the books, is relevant to prove the non-existence of that fact.—Absence of entries in the account books would be inconsistent with the receipt of the amounts and would thus be a relevant fact which can be proved under sections 11.³ In some earlier cases of the Calcutta High Court,⁴ it was held that though under section 34 of the Evidence Act the actual entries in a book of account, regularly kept in the course of business, are relevant, the mere absence of an entry in such book as to a transaction is not relevant to prove the non-existence of that transaction. In a subsequent case in the same Court, however, a different view of this matter was taken and the absence of an entry was held relevant, not under section 34, but under section 9 and section 11 of the Evidence Act.⁵ In a subsequent case in the same Court, however, a different view of this absence of entry of a fact in books of account in the following circumstances. The question was whether Z was the wife of the deceased. The books of account of the deceased contained entries of payments made to two admitted wives of the deceased, but there was no entry of any payment having ever made to Z. The books were given in evidence to show that, as there was no entry of any payment having been made to Z, Z was not the wife of the deceased. The High Court,⁶ not approving the view taken in the earlier cases,⁷ was inclined to treat the absence of entry of any payment to Z relevant, in accordance with the decision last cited.⁸ When the case went up to the Privy Council, this negative use of the absence of any such entry was not questioned, and this fact was treated as a relevant circumstance to show that Z was not the wife of the deceased.⁹ This decision of the Privy Council has been taken in India as an authority for the admissibility of absence of entries in books of account¹⁰ and as having overruled the earlier Calcutta cases to the

50. Gokal Mal Ram Chand v. Nath Mal Gulzari Mal, 75 I.C. 812: 1923 L. 431, followed in Buta v. Tirlok Chand, 100 I.C. 862: 1927 L. 903; for a still stronger case on the necessity of corroboration, see Ganeshi Lal v. Mangat Ram Atma Ram, 76 I.C. 157: 1924 L. 540.

1. Hira Bhagat v. Gobind Ram, 63 P.R. 1897.

2. Illustration to section 160.

3. State of Andhra Pradesh v. Ganeswara Rao, 1963 (2) Cr. L.J. 671: (1964) (2) S.C.A. 38.

4. Q.E. v. Grees Chunder Banerjee, 10 C. 1024; In the matter of Juggun Lal, 7 C.L.R. 356; see also the observations of Lord Devey and Lord Robertson in Ram Per-

shad Singh v. Lakhpatri Koer, 30 C. 231, 247: 30 I.A. 1 (P.C.).

5. Sagur Mal v. Manraj, 4 C.W.N. ccvii.

6. Imambandi v. Matasuddi, 13 I.C. 678: 15 C.L.J. 621.

7. Q.E. v. Grees Chunder Banerjee, 10 C. 1024; In the matter of Juggun Lal, 7 C.L.R. 356.

8. Sagur Mull v. Manraj, 4 C.W.N. ccvii.

9. Imambandi v. Matasuddi, 45 C. 876: 45 I.A. 73: 47 I.C. 513: 1918 P.C. 11.

10. Tara Kumar Ghose v. Kumar Arun Chandra Singh, 74 I.C. 383: 1923 C. 261; Debendra Nath Basu v. Arun Chandra Sinha, 1925 C. 64.

contrary.¹¹ This also fits in with the opinion expressed by Turner, L.J., in *Wise v. Bhodun Moyee Debia Chowdranie*.¹² If a transaction, in the ordinary course, should have been entered in a book, the fact that it was not recorded there, is presumptive proof of its non-existence. Such evidence is admissible both under section 9 and section 11 of the Evidence Act.¹³ Thus, where, when any partner of a certain firm made a journey on the firm's business, it was usual to enter in the books of the firm the expenses of the journey, and the question was whether M, a partner of the firm, visited Calcutta on a certain date, the absence of any entry relating to the expenses of the alleged journey by M to Calcutta was held admissible both under section 9 and section 11.¹⁴ The fact that no entry of an alleged payment is to be found in the regularly kept account books of the payer is relevant¹⁵ to show that no payment was made. The absence of recitals in a document may be used in evidence as against a person who is not a party to that document under section 9 and 11 of the Evidence Act. Therefore, the absence of the name of a party from the category of tenants mentioned in a road-cess return is evidence against him.¹⁶ The absence of an entry in a document is evidence, though its effect is to be determined in the light of general evidence in the case.¹⁷ The fact that a certain rivulet is not shown in Rennell's survey map is not sufficient proof of the non-existence of the rivulet in the parganna, kanungo and mauzawari registers and the thak map of 1852, is not sufficient to show that the land was the mal land of the zamindar and thus not liable to assessment to rent.¹⁸

Account relevant under section 34 and other sections of the Act, e.g., sections 32(2), 21, 157, 159 and 160; corroboration, whether necessary?—Accounts relevant only under section 34 are not alone sufficient to charge a person with liability; corroboration is required. But where accounts are relevant under section 32(2) also, they do not require corroboration as a matter of law. It is within the discretion of the Court to require or to dispense with corroborative evidence.²⁰ "Fortunately, how-

11. *Q.E. v. Grees Chunder Banerjee*, 10 C. 1024; In the matter of Juggan Lal, 7 C.L.R. 356.
12. 10 M.I.A. 165; *Tara Kumar Ghose v. Kumar Arun Chandra Singh*, 74 I.C. 383: 1923 C. 261.
13. *Ganga Ram Agarwalla v. Lachi Ram Kishen Dyal*, 28 I.C. 705: 19 C.W.N. 611; *Imrit Chamar v. Sridhar Panday*, 13 I.C. 120: 15 C.L.J. 7; *Sagur Mall v. Munraj*, 4 C.W.N. ccvii; see also *Tara Kumar Ghose v. Kumar Arun Chandra Singh*, 74 I.C. 383: 1923 C. 261; *Kasam v. Firm of Haji Jamal*, 76 I.C. 327: 1924 N. 22, where absence of entry was held relevant under section 7, section 8 and section 11.
14. *Sagur Mull v. Manraj*, 4 C.W.N. ccvii.
15. *Kasam v. Firm of Haji Jamal*, 76 I.C. 327: 1924 N. 22; *Ganga Ram Agarwalla v. Lachi Ram Kishen Dyal*, 28 I.C. 705: 19 C.W.N. 611.
16. *Imrit Chamar v. Sridhar Pandey*, 13 I.C. 120: 15 C.L.J. 7.
17. *Debendra Nath Basu v. Arun Chandra Sinha*, 1925 C. 64; *Tara Kumar Ghose v. Kumar Arun Chandra Singh*, 74 I.C. 383: 1923 C. 261; *Imambandi v. Mutsaddi*, 45 C. 878: 45 I.A. 73: 47 I.C. 513: 1918 P.C. 11; *Ganga Ram Agarwalla v. Lachi Ram Kishen Dayal*, 28 I.C. 705: 19 C.W.N. 611; as to the absence of entry in *wajibularz* as to the existence of custom of pre-emption see *Ali Nazir Khan v. Manik Chand*, 25 A. 90; *Sadhu Sahu v. Raja Ram*, 16 A. 40 (F.B.).
18. *Benode Lal Chakravarty v. Secretary of State*, 133 I.C. 573: 1931 C. 239.
19. *Bipradas Pal Choudhury v. Monorama Debi*, 45 C. 574: 47 I.C. 49.
20. *Abdul Wahad v. Nagendra Chandra*, 1940 C. 524; *Jabbar Ali Sardar v. Manmohan Pandey*, 55 C. 1216: 114 I.C. 485: 1929 C. 110; *Mon Moman Pandey v. Hari Nath Choudhury*, 110 I.C. 338: 1928 C. 408; *Gopeswar Sen v. Bijoy Chand*

ever, in practice we seldom come across a case in which the entry which comes under section 32, clause (2), is really sought to be used alone to charge any person with liability."²¹ An entry in a book of account may become relevant also under section 21, if it is against the interest of the person in whose books it appears, and, when used as an admission against a party's interest, the entry does not require corroboration.²² Even if the entry was not made by the party but by the party's agent, it will be admissible against the party²³ as an admission.²⁴ Besides, an entry may be used to contradict²⁴ to corroborate²⁵ the testimony, or refresh the memory,²⁶ of the person who made the entry, if such person is examined as a witness. A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.²⁷ But evidence given in this manner can hardly amount to independent corroboration of the entries. As to the applicability of sections 159 and 160 to evidence given by a witness by referring to books of account, see *Yesuvadiyan v. Subba Naicker*,²⁸ and *Mukundram v. Dayarami*.²⁹

Suspicious entry.—If the entry is made in a suspicious way, the circumstance detracts from the value of the entry.³⁰

An entry made in 1971 is not relevant on the question whether a person had taken a loan in 1916.³¹

Sections 34 and 90 Evidentiary value of loose sheets of account.—They have not the probative force of a book of account regularly kept. Being old documents, naturally the writer was not called and barring the fact that they were produced from the Receiver's possession there was nothing to show their genuineness.³²

- Mahatab Bahadur, 55 C. 1167: 108 I.C. 883: 1928 C. 854; Rani v. Bahadur Mal Buti Mal, 63 I.C. 946: 1922 L. 119; Charitter Rai v. Kailash Behari, 44 I.C. 422; Ramaswami Naik v. Ramanadhan Chetty, 22 I.C. 627; Bhaba Sundari Devi v. Taira Nasya, 6 I.C. 369; Daji Abaji Khare v. Gobind Narayan Bapar, 10 Bom. L.R. 811; Ramapayarabai v. Balaji Shridhar, 28 B. 294; but see the judgment of Mukerji, J. in *Gopeswar Sen v. Bijoy Chand Mahatab Bahadur*, 55 C. 1167: 108 I.C. 883: 1928 C. 854, where the correctness of this view has been questioned and corroboration has been considered necessary both as a matter of prudence and as a matter of law.
21. Per Mukerji, J., in *Gopeswar Sen v. Bijoy Chand Mahatab Bahadur*, 55 C. 1167: 108 I.C. 883: 1928 C. 854.
22. *Mahomed Baksh v. Rawalpindi Club Ltd.*, 1935 L. 222; *Mathila*

- Sice v. Gaebele*, 96 I.C. 429: 1926 M. 955; *Nanilal Das v. Nutbehari Das*, 38 C.W.N. 861.
23. *Nanilal Das v. Nutbehari Das*, 38 C.W.N. 861.
24. Section 145; *Mukundram v. Dayaram*, 23 I.C. 893.
25. Section 157; *Keyarsosp v. Garbad*, 120 I.C. 224: 1930 N. 24; *Mukundram v. Dayaram*, 23 I.C. 893.
26. Sections 159, 160; *Keyarsosp v. Garbad*, 130 I.C. 224: 1930 N. 24; *Ramprasad v. Nathuram*, 68 I.C. 494: 1923 N. 32; *Yesuvadiyan v. Suba Naicker*, 52 I.C. 704; *Mukundram v. Dayaram*, 23 I.C. 893.
27. Illustration to section 160.
28. 52 I.C. 704.
29. 23 I.C. 893.
30. *Venkata Mallayya v. Ramaswami and Co.*, A.I.R. 1964 S.C. 818.
31. *Ramji v. Bomanji*, 62 Bom. L.R. 322.
32. *Mahasay Ganesh Prasad Ray v. Narendra Nath Sen*, 17 Cut. L.T. 73, 1951 Ker. L.T. (S.C.) 28.

Rent collection papers, Jamawasilbaqi, jamabandi, talib baqi papers, etc.—Jamawasilbaqi papers are yearly accounts showing the total rent demandable from each raiyat for the current year, the balance of the previous year, the amounts collected during the year, and the balance due. The jamabandi papers, on the other hand, show the quantity of land held by each cultivator, its different qualities, the rate of rent for each kind, the total rent for all the lands in each cultivator's possession and, lastly, the grand total of all the lands of every kind held by him. These two classes of papers are not identical in their nature; but, from the point of view of section 34, there is no difference between them.³³ They are books of account kept in the course of zamindari business,³⁴ and, if proved to have been regularly kept, are relevant under section 34 and admissible in evidence even if not corroborated.³⁵ Under the old,³⁶ such papers were only admissible as "corroborative" evidence, and therefore, if there was no other evidence in the case, they were altogether inadmissible.³⁷ The language of the present Act, however, is materially different from the language of the old Act, and such papers are admissible even if not corroborated.³⁸ In some cases decided under the present Act, the language of the old Act has been used, and such papers have been held to be inadmissible as "independent" or "substantive" evidence in the absence of other evidence,³⁹ but, as has been mentioned before,⁴⁰ this is not a correct view of the present section. When used under section 34, these papers are, of course, not sufficient to charge a person with liability. It has, however, been held in several cases that when such papers are given in evidence to show variation in the rent paid by a tenant and thus to rebut the presumption under section 50 of the Bengal Tenancy Act, it cannot be said that they are used to charge a person with liability,⁴¹ and,

33. Aktowli v. Tarak Nath Ghose, 17 I.C. 266: 16 C.L.J. 328.

34. Brajnath Bhakat v. Bimalendu Roy, 1947 C. 21; Deonarayan Singh v. Dwarka Prasad Singh, 109 I.C. 136: 1928 P. 429; Gajjo Koer v. Syed Ally Ahmed, 14 W.R. 474: 6 B.L.R. App. 62.

35. Gopeswar Sen v. Bijoy Chand Mahatab Bahadur, 55 C. 1167: 108 I.C. 883: 1928 C. 854.

36. Section 43 of Act 11 of 1855.

37. As to jamawasilbaqi papers, see Jonab Biswas v. Siva Kumari Debi, 104 I.C. 733: 1927 C. 855; Beejoy Gobind Bural v. Bheekoo Roy, 10 W.R. 291; Sheo Suhaye v. Goodur Roy, 8 W.R. 328; Ram Lall Chuckerbutty v. Tara Sundari, 8 W.R. 280; Kheeronanee Dassee v. Beejoy Gobind Bural, 7 W.R. 533; Gopal Mundul v. Nobo Kishen, 5 W.R. Act X Rulings, 33; as to jamabandi papers, see Kishore Doss v. Pursun Mahtoon, 20 W.R. 171; Dhanookdharee v. Toomey, 20 W.R. 142; Gajjo Koer v. Syed Ally Ahmed, 14 W.R. 474; Chamarnee Bibbe v. Ayenoollah Sirdar, 9 W.R. 451.

38. Gopeswar Sen v. Bijoy Chand

Mahatab Bahadur, 55 C. 1167: 108 I.C. 883: 1928 C. 854; Belaet Khan v. Rash Beharee Mookerjee, 22 W. R. 549; see also E. v. Narbada Prasad, 51 A. 864: 121 I.C. 819: 1930 A. 38: 31 Cr. L.J. 356; Yesuvadiyan v. Subba Naicker, 52 I.C. 704.

39. See Jonab Biswas v. Siva Kumari Debi, 104 I.C. 733: 1927 C. 855; Deonarayan Singh v. Dwarka Prasad Singh, 109 I.C. 136: 1928 P. 429; Faijaddin v. Agni Kumar Sarma, 71 I.C. 300: 1924 C. 370.

40. See notes to this section under the heading "evidentiary function of the entries; entries relevant but not sufficient to charge a person with liability."

41. Abdul Wahad v. Nagendra Chandra, 1940 C. 524; Gopeswar Sen v. Bijoy Chand Mahatab Bahadur, 55 C. 1167: 108 I.C. 883: 1928 C. 854; Nirod Krishna Ghose v. Produt Kumar Tagore, 32 I.C. 794; Dukha Mandal v. Grant, 16 I.C. 467: 16 C.L.J. 24; Belaet Khan v. Rash Beharee Mookerjee, 22 W.R. 549; contra Aktowli v. Tarak Nath Ghose, 17 C. 266: 16 C.L.J. 328; Surnomoyi v. Johur Mahomed Nashyo, 10 C.L.R. 545.

therefore, corroboration is not necessary as a matter of law.⁴² If the person who prepared the papers is dead, they become admissible under section 32(2) as well,⁴³ and then corroboration ceases to be a legal necessity.⁴⁴ It should, however, be remembered that such papers, whether admitted under section 34 or under section 32(2), are open to great suspicion; for having been prepared by the landlord's agents and in the absence of the tenants, they belong to the self-serving type of evidence.⁴⁵ It is, therefore, usual to require corroboration, even when corroboration may not be necessary as a matter of law.⁴⁶ The evidentiary value of such papers, when they are sought to be used against the tenant, has got to be carefully appraised; the entries themselves have to be scrutinized with care and the circumstances under which they were made carefully considered. The occasions on which they have, without corroboration, been implicitly relied on against the tenants are few and far between. The reason why they find this disfavour is that they are made behind the back of the tenants and they put the tenants entirely at the mercy of the zamindar or his agents. When, however, there is nothing to suggest that they were made with a motive, and all the circumstances point to their having been made in the ordinary course of business, the chances of their accuracy and of the transactions to which they relate being true are considerably enhanced. It depends, therefore, on all the circumstances of any particular case whether they would require corroboration or not for their acceptance when given in evidence to show variation in the rent paid by the tenant.⁴⁷ They cannot, however, be entirely ignored on the ground that they were prepared in the landlord's office in the absence of the tenants;⁴⁸ they are entitled to credit on the same principle as other

42. This follows from the decisions cited in the preceding note, but is contrary to the view taken in *Deonarayan Singh v. Dwarka Prasad Singh*, 109 I.C. 136: 1928 P. 429; *Jonab Biswas v. Siva Kumari Debi*, 104 I.C. 733: 1927 C. 855; *Faijaddin v. Agni Kumar Sarma*, 71 I.C. 300: 1924 C. 370; *Aktowli v. Tarak Nath Ghose*, 17 I.C. 266: 16 C.L.J. 328; *Surnomoyi v. Johur Mahomed Nashyo*, 10 C.L.R. 545, where corroboration seems to have been considered necessary as a matter of law.

43. For jamawasilbaqi papers, see *Jabbar Ali Sardar v. Monmohan Pandey*, 55 C. 1216: 114 I.C. 485: 1929 C. 110; *Man Mohan Pandey v. Hari Nath Chaudhury*, 110 I.C. 338: 1928 C. 408; *Dukhu Mia v. Jagdish Nath Roy Bahadur*, 90 I.C. 564: 1926 C. 359; for jamabandi papers, see *Mon Mohan Pandey v. Hari Nath Chaudhury*, 110 I.C. 338: 1928 C. 408; *Dukho Mia v. Jagdish Nath Roy Bahadur*, 90 I.C. 564: 1926 C. 359; *Charitter Rai v. Kailash Behari*, 44 I.C. 422; *Dukha Mandal v. Grant*, 16 I.C. 467: 16 C.L.J. 24; see also *Durga Priva Choudhury v. Hazra Gain*, 62 I.C. 453: 1921 C. 345.

44. For jamawasilbaqi papers, see

Abdul Wahad v. Nagendra Chandra, 1940 C. 524; *Jabbar Ali Sardar v. Monmohan Pandey*, 55 C. 1216: 114 I.C. 485: 1929 C. 110; *Mon Mohan Pandey v. Hari Nath Chaudhury*, 110 I.C. 338: 1928 C. 408; for jamabandi papers, see *Mon Mohan Pandey v. Hari Nath Chaudhury*, 110 I.C. 338: 1928 C. 408; *Charitter Rai v. Kailash Behari*, 44 I.C. 422; *Dukha Mandal v. Grant*, 16 I.C. 467: 16 C.L.J. 24.

45. For jamawasilbaqi papers, see *Sheo Suhaya v. Goodur Roy*, 8 W.R. 328; *Allyat Chinaman v. Juggut Chunder Roy*, 5 W.R. 242; for jamabandi papers, see *Gajjo Koer v. Syed Ally Ahmed*, 14 W.R. 474.

46. See *Faijaddin v. Agni Kumar Sarma*, 71 I.C. 300: 1924 C. 370; *Jonab Biswas v. Siva Kumari Debi*, 104 I.C. 733: 1927 C. 855; *Deonarayan Singh v. Dwarka Prasad Singh*, 109 I.C. 136: 1928 P. 429, where corroboration seems to have been considered necessary as a matter of law.

47. *Gopeswar Sen v. Bijoy Chand Mahatab Bahadur*, 55 C. 1167: 108 I.C. 883: 1928 C. 854, per Mukerji, J.

48. *Mon Mohan Pandey v. Hari Nath Chaudhury*, 110 I.C. 338: 1928 C. 408.

contemporary records made and kept by the party producing them in the ordinary course of his business.⁴⁹ When the papers are signed by the tenant, they would amount to an admission and the tenant would be bound by them.⁵⁰ In the absence of the *patwari* who collected the rent, they are not of much value;¹ but coupled with his evidence, they might constitute sufficient evidence of the rate of rent mentioned therein.² If the person who prepared the papers is examined as a witness, they may be used to refresh the witness's memory.³

Corroboration necessary for entries in account books.—Plaintiff is entitled to a decree on the basis of the entries in regularly kept account books provided they are corroborated.⁴ The provisions of section 34 of the Evidence Act are clear enough and they have been constantly interpreted as laying down a rule of evidence that the entries in the books of accounts would not be sufficient for the purposes of fixing the liability against a person. There should be additional evidence independent of those entries. The entries from books of accounts are corroborative piece of evidence and they would not by themselves be sufficient evidence for fixing liability.⁵

35. An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact.

COMMENTARY

Principle.—Statements in public documents are receivable to prove the facts stated, on the general ground that they were made by the authorized agents of the public in the course of official duty and respecting facts which were of public interest or required to be recorded for the benefit of the community. In many cases, indeed in nearly all cases, after a lapse of years it would be impossible to give evidence that the statements contained in such documents were in fact true, and it is for this reason that this exception is made to the rule against hearsay⁶ and the statements declared relevant. The section is based upon the circumstances that, in the case of official documents, entries are made in the discharge of public duty by an officer who is the authorized and accredited agent appointed for the purpose. The law reposes such confidence in

49. *Kheerononee Dassee v. Beejoy Gobind*, 7 W.R. 533.

50. *Watson & Co. v. Mohendra Nath Paul*, 29 W.R. 436.

1. *Bhugwan Dutt Jha v. Seo Mangal Singh*, 22 W.R. 256; see *Faijaddin v. Agni Kumar Sarma*, 71 I.C. 300: 1924 C. 370.

2. *Dhanookdharee v. Toomey*, 29 W.R. 142; *Bhugwan Dutt Jha v. Sheo Mungal Singh*, 22 W.R. 256.

3. See sections 159 and 160; *Kheerononee Dassee v. Beejoy Gobind Bural*, 7 W.R. 533.

4. *Ganpati Ram v. Narsingh Charan Sahu*, (1972) 38 C.L.T. 309.

5. *Shub Karan v. Durga Prasad (P) Ltd.* (1972) 13 G.L.R. 179.

6. *Ghulam Rasul Khan v. Secretary of State for India*, 6 L. 269: 52 I.A. 201: 86 I.C. 654: 1925 P.C. 170; Taylor, § 1591.

public officers that it presumes they will discharge their several trusts with accuracy and fidelity.⁷

Scope—Hath Chitha.—The reason why an entry made by a public servant in a public or other official book, register, or record stating a fact in issue or a relevant fact has been made relevant is that when a public servant makes it himself in discharge of his official duty, the probability of its being truly and correctly recorded is high. No proof has been led in this case as to who made the entry and whether the entry was made in the discharge of any official duty. As the High Court rightly pointed out, the Additional Sessions Judge should have dealt with the question of the admissibility of the document. Therefore the document was inadmissible in evidence.⁸

The statement must be in a public or other official book, register or record as distinguished from a merely private register or record. This requirement of the section being complied with, the statement may have been made either by a public servant in the discharge of his official duty or by any person other than a public servant; but, in the latter case, the statement must be shown to have been made in performance of a duty specially enjoined by the law.⁹ In order that a document may be admissible under section 35, it is not necessary that the public servant preparing it should be compellable by legislative enactment to discharge the duty of preparing or keeping it.¹⁰ The wording of the section conveys the idea of a duty imposed upon the maker of the entry by law or his official position to record the information he possesses or has gathered in an official document. It further imports that the entry will be of a permanent nature and thus excludes all such writings as are merely of an ephemeral character, and, in so far as they do not incorporate the result of personal inquiries, are not intended to be used for reference in future. Another idea that runs underneath this section is that the person making the entry should be such as is invested with authority to record a decision which, so far as the matter before him is concerned, will be final. It thus excludes all views expressed before the final stage is reached and makes only those decisions which constitute the final word in the matter relevant.¹¹

The reason why an entry made by a public servant in a public or other official book, register or record stating a fact in issue or a relevant fact has been made relevant is that when a public servant makes it himself in the discharge of his official duty, the probability of its being truly and correctly recorded is high. That probability is reduced to a minimum when the public servant himself is illiterate and has to depend on somebody else to make the entry. Accordingly an entry made in an official record of births maintained by an illiterate chowkidar or by some-

7. *Tarak Chandra Chakraborty v. Prosanna Kumar Saha*, 78 I.C. 719: 1924 C. 654, per Mukerji, J.

8. *Ram Prasad Sharma v. State of Bihar*, 1971 S.C.I. (1), 184.

9. See *Samar Dasadh v. Juggul Kishore Singh*, 23 C. 366; *Devarapalli Ramalinga Reddi v. Srigiri-*

raju Kotayya, 41 M. 26: 41 I.C. 286.

10. *Phakkar v. Pragi*, 154 I.C. 570: 1935 O. 268.

11. *Ghulam Mohammad Khan v. Samundar Khan*, 1936 L. 37: 165 I. C. 626; *Sant Ram v. Sital Das*, 1952 Punj. 301: 1952 P.L.R. 226.

body else at his request does not come within section 35 of the Evidence Act.¹²

Public or other official register, book or record; public servant.—The terms “public”, “official” and “public servant” are not defined by the Act; but, for purposes of interpretation, reference may be made to section 74 which defines “public documents”, to section 78 which refers to other “official” documents,¹³ and to section 21 of the Indian Penal Code, where the term “public servant” is defined. The term “public servant” includes the public servant of a foreign country.¹⁴ Orders of detention passed under Rule 26(1) (b) of the Defence of India Rules are not public records.¹⁵

Section 35 is applicable to an entry in a public or other official record of a foreign country.—The words “specially enjoined by the law of the country in which such book, register or record is kept” which are used in the section clearly show that entries in the public records of foreign countries are relevant under the section. The reference to the law of the country in which such book, register or record is kept would be quite unnecessary, if it was intended to cover only cases of entries in a public or official book, register or record kept in India.¹⁶

Contemporaneousness; personal knowledge.—It is not necessary that the entry should have been made contemporaneously with the fact recorded or that the entrant should have had personal knowledge of the fact of which entry is made. “The principle upon which entries in a register are received depends on the public duty of the person who keeps the book, register or record to make such entries after satisfying himself of their truth. It is not that the writer makes them contemporaneously, or of his own knowledge, for no person in a private capacity can make such entries”.¹⁷ A register is evidence of the particular transaction which it was the officer’s duty to record, even though he had no personal knowledge of its occurrence.¹⁸ An entry in a public register kept for the public benefit under the sanction of official duty is relevant under section 35, even though the person who made the entry had no personal knowledge of the fact entered or the register was copied from a previous register which had become untidy.¹⁹

Entry in an official record made in excess of official duty, whether admissible?—An entry shown to have been made in excess of the official

12. Brij Mohan Singh v. Narain Sinha, 1964 S.C.J. (2) 644.

13. See the marginal note to section 78, post.

14. Maharaj Bhanudas Narayanboa Gosavi v. Krishnabai Chintaman Deshpande, 50 B. 716: 99 I.C. 307: 1927 B. 11.

15. Harkishan Das v. E., 1944 L. 33: I.L.R. 1944 L. 245: 212 I.C. 321 (F.B.).

16. Maharaj Bhanudas Narayanboa Gosavi v. Krishnabai Chintaman Deshpande, 50 B. 716: 99 I.C. 307: 1927 B. 11; see also Ponnammal v. Sundaram Pillai and others, 23 M.

‘609 ‘667

17. Phipson, Ev., 7th Ed., 328; see Woodroffe, Ev., 9th Ed., 383; Graham v. Phanindra Nath Mitter, 31 I.C. 41: 19 C.W.N. 1038; Shoshi Bhooshun Bose v. Girish Chunder Mitter, 20 C. 940; Lekhraj Kuar v. Mahpal Singh, 5 C. 744: 7 I.A. 63 (P.C.); see, however, Ambalavana Pandarasannadhi Avergal v. Sree Minakshy Devasthanam, 26 I.C. 841; Saraswati Dasi v. Dhanpat Singh, 9 C. 431.

18. Doe v. Andrews, 15 Q.B. 756; Phipson, Ev., 7th Ed., 330.

19. Graham v. Phanindra Nath Mitter, 31 I.C. 41: 19 C.W.N. 1038.

duty of the entrant is not admissible.²⁰ Entries of matters which it is not the duty of the public servant to record,²¹ or which he is neither expected nor permitted to record,²² are not admissible. Statements of collateral facts which it was no part of the public servant's duty to inquire into are similarly inadmissible.²³ Thus, a statement as to the legitimacy of a child recorded in a *wajibularz* is inadmissible, being in excess of the functions of the recording officer.²⁴ An entry about a civil suit and its dismissal is not one of the particulars required to be entered in the revenue records. The entry being an unauthorised entry does not carry with it any statutory presumption of accuracy.²⁵ An entry as to the status of a person being the adopted son of his father has no presumption of correctness.²⁶ But if incidental particulars concerning the main transaction are required by law to be included in the entry, they are admissible.²⁷ The mere fact that a public servant has acted under a misconception about his official duty is not sufficient to take an entry made by such official act out of the class referred to in section 35.²⁸ It is not necessary that the duty should be prescribed by any enactment. It is enough if it is prescribed by rules made under authority of an enactment.²⁹

Entry, if not made by the proper official, whether admissible?—The entries must be made by, or under the direction of, the person whose duty it is to make them at the time. Thus, where entries in the books of a public office had been made, not by some specific person in the discharge of his official duty, but indiscriminately by any of the clerks in the office, they were rejected.³⁰ In some cases, entries in registers of births and deaths have been held to be inadmissible, on the ground that they were not made by the public servant keeping the registers but by others.³¹

Absence of entry in a public or official book, register or record, whether relevant?—It was formerly held that the absence of entry of a relevant fact in an official book, register or record was not by itself relevant;³² but this view must now be taken to have been overruled by the

20. This follows from the observations of the Privy Council in *Raj Kishore Deo v. Bani Mahto*, 47 I.C. 1: 1917 P.C. 197; *State v. Kamruddin Imamoddin*, 1956 N. 74.
21. *Lyell v. Kennedy*, 14 A.C. 437; *Prabhu Narain Singh v. Jitendra Mohan Singh*, 1948 O. 307: 22 Luck. 522; see also *Namdeo Shankar Patil v. Ramrao Maroti Patil*, 140 I.C. 152: 1933 N. 310; *Tara Kumar Ghose v. Kumar Arun Chandra Singh*, 1923 C. 261: 74 I.C. 383; but see *Suresh Ch. Rai v. Sitaram Singh*, 57 I.C. 126.
22. *Ali Nasir Khan v. Manik Chand*, 25 A. 90, 104.
23. *Madhavrao Appaji Sathe v. Deonak*, 21 B. 695; *Sukhdev Singh v. Mathra Singh*, 142 I.C. 606: 1933 L. 412.
24. *Sukhdeo Singh v. Mathra Singh*, 142 I.C. 606: 1933 L. 412.
25. *Mohan Jha v. Shivadayal Prasad*, 1950 P. 293.
26. *Hariharsingh Sukhram Channahu v. Deonarayan Bodhram Channahu*, 1954 N. 319.
27. *Re Stollery*, (1926) 1 Ch. 284; *Phipson, Ev.*, 7th Ed., 330, 331.
28. *Prem Jagat Kuer v. Harihar Baksh Singh*, 1946 O.W.N. 26.
29. *Bishnath Prasad v. E.*, 1948 O. 1: 48 Cr. L.J. 542: 230 I.C. 144.
30. *Phipson, Ev.*, 7th Ed., 329.
31. *Sheo Balak v. Gaya Prasad*, 77 I. C. 52: 1922 A. 510; *Mohammad Jafar v. E.*, 54 I.C. 166: 21 Cr. L. J. 22; *Jiwan Bakhsh v. Khan Bahadur Khan*, 19 I.C. 528; *Sampat v. Gauri Shankar*, 10 I.C. 713; but see *Madho Saran Singh v. Manna Lal*, 1933 P. 473.
32. In the matter of *Juggun Lal*, 7 C. L.R. 356; see *Bipardas Pal Choudhury v. Monorama Debi*, 45 C. 574: 47 I.C. 49.

Privy Council decision in *Imambandi v. Mutsaddi*³³ in which the absence of entry of a relevant fact in a document was itself treated by the Board as a relevant fact. See note to section 34 under the heading "absence of any entry.....of that fact".

Admissibility of registers of births, baptisms, marriages or deaths.—In England, registers of births and deaths (or certified copies thereof) are, on their mere production, statutory proof both of the fact and date of birth or death. The register is also evidence of the place of birth or death, where this fact has been added under the direction of the Registrar General.³⁴ But a register of deaths is not evidence of the cause of death.³⁵ Registers of baptisms are evidence of the date and place of baptism, but not of the date or place of birth.³⁶ Registers of marriages are evidence of the fact and date of marriage.³⁷ A register of burials kept under the Registration of Burials Act, 1864, is evidence of the burials recorded therein, but not of the date of death, nor of the age of the deceased, though stated therein.³⁸ An entry of a Christian marriage made in a marriage register is, under section 80 of the Christian Marriages Act, admissible in proof of marriage.³⁹

The Hindu Marriage Register and certified extracts therefrom as maintained under section 8(4) of the Hindu Marriage Act, 1955 is admissible.

Though the entry regarding the birth in a birth register is receivable in evidence under this section, it is wrong to assume that mere filing of a copy of an entry in the birth register proves *ipso facto* that the entry relates to or proves the birth of the person concerned. Evidence has to be introduced to connect that entry with the person whose date of birth has to be established. Connection of the identity of the person under the entry must be established by other evidence.⁴⁰

Even, if the information, regarding birth or death of a particular person, is not given within the prescribed time, yet, on that account, it cannot be held that the entries regarding birth or death are not admissible, inasmuch as these entries can safely come within the purview of this section. The birth or death register is maintained by a public servant in the discharge of his official duty and it cannot be ignored.⁴¹

Where there is a dispute as to the date of birth or death of a person, an extract from the register of births or deaths is bound to be accepted as conclusive of the matter, if there is no controversy that the extract does not relate to the person, the date of whose birth or death is

33. *Imambandi v. Matsuddi*, 45 C. 878; 45 I.A. 73; 47 I.C. 513; 1918 P. C. 11.

34. Births and Deaths Registration Act, 1837, Births, Marriages and Deaths Registration Act, 1836; Births and Deaths Registration Act, 1874; Registration (Births, Still-births, Deaths and Marriages) Regulations, 1927 and 1929; Phipson, Ev., 7th Ed., 331, 665, 666; *Re Goodrich*, *Payne v. Bennett*, 1940 P. 138.

35. *Bird v. Keep*, (1918) 2 K.B. 692 A.C.

36. Phipson, Ev., 7th Ed., 331.

37. *Doe v. Barnes*, 1 M. & Rob. 386; Phipson, Ev., 7th Ed., 331, 332.

38. Phipson, Ev., 7th Ed., 332.

39. *W. D. v. E. D.*, 141 I.C. 284; 1933 S. 27.

40. *Paryani Bai v. Bajirao*, I.L.R. 1961 B. 963; 64 Bom. L.R. 86.

41. *Manickchand v. Bhagwan Das*, 1964 B.L.J. 283.

in question. A birth or death register is covered by the language of this section.⁴²

Entries in the register of births and deaths are *prima facie* evidence of what is stated in them.⁴³ In *Ratcliffe v. Ratcliffe and Anderson*,⁴⁴ it was pointed out that a register of births and deaths kept under the orders of the East India Company was a public document of the description mentioned in section 35. The Madras High Court also has held that, apart from any special enactment, registers which are being kept under the direction of the Board of Revenue since the year 1865 are relevant under section 35.⁴⁵ It has never been questioned that a register of births and deaths, kept by a *chaukidar*,⁴⁶ a *muqaddam*,⁴⁷ a *topadar*⁴⁸ or a village *munsiff*,⁴⁹ or in a police station,⁵⁰ is an official register, and that an entry of birth or death made therein would be relevant under section 35, if proved or properly presumed to have been made either by a public servant in the discharge of his official duty or by any other person in performance of a duty specially enjoined by the law.¹ The Calcutta High Court holds that in such cases there is a presumption under section 114 that the entry was properly made, i.e., that the entry was made by a public servant in the discharge of his official duty, and that formal proof of the fact that a particular officer made the entry is not necessary.² The Allahabad High Court also dispenses with such proof if the register is one directed to be kept by any enactment or the rules made thereunder, e.g., a register of deaths kept in the police station under Chap. XXIV para. 274, sub-para. (4) of the Police Regulations;³ though in some earlier cases, this Court, agreeing with the view taken of this matter by the Oudh Court,⁴ had rejected entries of births and deaths in Municipal⁵ or *chaukidars*'⁶ registers of births and deaths where it was not proved who

42. *Bagiammal v. Kamalammal*, 77 L.W. 679.

43. *Allianz Und Stuttgarter Life Insurance Bank Ltd. v. Hemanta Kumar Das*, 1938 C. 641: 178 I.C. 554: 42 C.W.N. 855; *Bharat Basi v. Gopi Nath*, 1941 A. 385; *Manicka Mudaliar v. Ammakannu*, 1942 M. 129.

44. (1859) 1 Swabey & Tristram, 467.

45. *Devarappali Ramalinga Reddi v. Srigiriraju Kotayya*, 41 M. 26: 41 I.C. 286.

46. *Madho Saran Singh v. Manna Lal*, 1933 P. 473; *Mohammad Jafar v. E.*, 54 I.C. 166: 21 Cr. L.J. 22; *Zaibunissa v. Hasratunnissa*, 52 I.C. 162; see also *Baldei v. Abhey Ram*, 24 I.C. 540.

47. *Shri Kisen Bhikam Chand v. Jagoba Mahipat*, I.L.R. 1937 N. 382: 1937 N. 264.

48. *Gehimal Dyalmal v. Karmoomal Sirromal*, 35 I.C. 551.

49. *Chakravarthi Nainar v. Pushpawathi Ammal*, 95 I.C. 1005: 1926 M. 985; *Rangappa Nayakan v. Rangaswami Nayakan*, 88 I.C. 249: 1925 M. 1005.

50. *Shib Deo Misra v. Ram Prasad*, 46 A. 637: 87 I.C. 933: 1925 A. 79; *Zaibunissa v. Hasratunnissa*, 52 I.C. 162; *Tamiz-ud-Din Sarkar v. Taju*, 46 C. 152: 46 I.C. 237; *Dasi Ram v. E.*, 1947 A. 429: 1947 A.L.J. 76: 48 Cr. L.J. 449; *Manikrao Jairamji v. Deorao Baliram*, 1955 N. 290.

1. See *Mohammad Jafar v. E.*, 54 I.C. 166: 21 Cr. L.J. 22.

2. *Tamiz-ud-Din Sarkar v. Taju*, 46 C. 152: 46 I.C. 237.

3. *Shiv Deo Misra v. Ram Prasad*, 46 A. 637: 87 I.C. 938: 1925 A. 79; *Dasi Ram v. E.*, 1947 A. 429: 1947 A.L.J. 76: 48 Cr. L.J. 449.

4. For Oudh cases, see *Mohammad Jafar v. E.*, 54 I.C. 166: 21 Cr. L.J. 22; *Bisheshar Dayal v. Hira Lal*, 36 I.C. 941; *Habibullah v. E.*, 18 I.C. 653: 14 Cr. L.J. 93; *Sampat v. Gauri Shankar*, 10 I.C. 713; but see *Zaibunissa v. Hasratunnissa*, 52 I.C. 162.

5. *Jiwan Bakhsh v. Khan Bahadur Khan*, 19 I.C. 528.

6. *Sheo Balak v. Gaya Prasad*, 77 I. C. 52: 1922 A. 510.

had made the particular entry in the register.⁷ In Oudh it has been held that neither section 81 nor illustration (e) to section 114 is applicable to such cases, and that it is not enough to prove that the register is an official book. There must be further proof that the entry in the register relied on was made either by a public servant in the discharge of his official duty or by some other person in performance of a duty specially enjoined by the law of the country. It is not sufficient to show that the Inspector General of Police had power to require a **chaukidar** to carry about the register and to require the police writer at every **thana** to make entries in it. There must be either a "specific enactment" directing the keeping of the register in a particular form,⁸ or proof that the particular entry in the register was made by a public servant in the discharge of his official duty.⁹ Therefore, where the entry does not purport to have been made by a public officer and there is no evidence who made the entry in the **chaukidar's** register, the entry would be, according to this view, inadmissible,¹⁰ and the same would be the result if the entry in the register was not made by a public servant in the discharge of his duty, but by a private person. The Allahabad High Court draws a distinction between a **chaukidar's** register and a register kept at the **thana**; but it is submitted that the distinction is not real, as both these classes of registers are maintained in pursuance of the rules framed under the same enactment.¹¹ Section 81 of the Evidence Act, therefore, is either applicable or not applicable to both classes of registers. The Oudh Court holds that the presumption of section 81 is not applicable, as the register is not required to be kept in a particular form by any "specific enactment", and that, therefore, proof of the particular entry having been made by a public servant is necessary. This reasoning being equally applicable to the **thana** register, the entries therein also would, according to this view, require similar proof. On the other hand, the Allahabad High Court applies section 81 to the **thana** registers, as they are kept in pursuance of the rules framed under section 12 of the Police Act, Act V of 1861,¹² but since a **chaukidar's** register also is required to be kept by the rules framed under the same enactment, the presumption of section 81 would be equally applicable to the entries made in it. For Madras there is a specific enactment, Act III of 1899, which makes provisions for the registration of births and deaths in rural tracts, and section 81 would clearly be applicable to the registers kept under that enactment.¹³ But even if the register be one which is not kept under Act III of 1899 but is kept under the direction of the Board of Revenue, according to the Madras case last cited,¹⁴ the entry would still be relevant; and in another case the Madras High Court has held that an entry of birth in a village

7. But see *Baldei v. Abhey Ram*, 24 I.C. 540, where the Oudh view was doubted.

8. *Mohammad Jafar v. E.*, 54 I.C. 166: 21 Cr. L.J. 22.

9. *Mohammad Jafar v. E.*, 54 I.C. 166: 21 Cr. L.J. 22; *Bisheshar Dayal v. Hira Lal*, 36 I.C. 941; *Habibullah v. E.*, 18 I.C. 653: 14 Cr. L.J. 93; *Sampat v. Gauri Shankar*, 10 C. 713; but see *Zaibunissa v. Hasratunissa*, 52 I.C. 162.

10. *Mohammad Jafar v. E.*, 54 I.C. 166: 21 Cr. L.J. 22; *Sampat v. Gauri Shankar*, 10 I.C. 713; but see *Zaibunissa v. Hasratunissa*, 52 I.C. 162.

unissa v. Hasratunissa, 52 I.C. 162.

11. Section 12 of Act V of 1861 (The Police Act).

12. *Shib Deo Misra v. Ram Prasad*, 46 A. 637: 87 I.C. 938: 1925 A. 79; *Dasi Ram v. E.*, 1947 A. 429: 1947 A.L.J. 76: 48 Cr. L.J. 449.

13. See *Devarpalli Ramalinga Reddi v. Srigiriraju Kotayya*, 41 M. 26: 41 I.C. 286.

14. *Devarpalli Ramalinga Reddi v. Srigiriraju Kotayya*, 41 M. 26: 41 I.C. 286.

munsiff's register is receivable in evidence.¹⁵ The Madras case cited above¹⁶ has, however, been understood in Oudh as laying down the correct law only on the assumption that the entry to be given in evidence is one which purports or is proved to have been made by a public servant. Where the entry does not purport to have been made by a public servant, it must, according to the Oudh view, be proved to have been made by a public servant, unless it occurs in a register required specially to be kept by a "specific enactment".¹⁷ In a case the Patna High Court has held that an entry as to the date of birth of a person made in the **hathchita** of a **chaukidar** is admissible, even if the entry was not made by the **chaukidar** himself but at his instance by the **dafadar**, provided the **dafadar** has been called to prove the entry;¹⁸ but in another case where there was no evidence to show who entered the fact of a death in the **hathchita** of a **chaukidar**, the entry was rejected.¹⁹ A birth register is relevant under section 35.²⁰ An entry in a Municipal register of births and deaths is admissible.²¹

Chowkidar Hatachitha entries—Book not produced but a leaf of the book.—Still admissible if requirements of section 35 are satisfied.²²

Entries made in an official record maintained for an illiterate **chowkidar**, by someone else at his request does not come within section 35 of the Evidence Act, and are not admissible in evidence for any purpose.²³

Entries in Hatchitha Book about child birth—Admissibility to prove paternity—Non-mention of name of child.—If ground for not relying on it. It is the normal practice obtaining in these parts of the country (Orissa) that at least until the 21st day, a name is not given to a son and for a month from the date of birth ordinarily a daughter is not named and the refusal to attach importance to these entries mainly on account of the fact that the names were not given is not a proper reason for refusing to attach importance to the entries.²⁴

Certified copies of registers of births and deaths admissible.—When a birth or death entry becomes relevant under the provisions of this section, a certified copy thereof becomes admissible.²⁵ But such a

15. Chakravarthi Nainar v. Pushpawati Ammal, 95 I.C. 1005: 1926 M. 985. See also Rangappa Nayakan v. Rangaswami Nayakan, 88 I.C. 249: 1925 M. 1005.

16. Devarpalli Ramalinga Reddi v. Srigririraju Kotayya, 41 M. 26: 41 L.C. 286.

17. Mohammad Jafar v. E., 54 I.C. 166: 21 Cr. L.J. 22; but see Zaibunnissa v. Hasratunnissa, 52 I.C. 162.

18. Madho Saran Singh v. Manna Lal, 1933 P. 473; for similar Nagpur case, see Shri Kisen Bhikam Chand v. Jagoba Mahipat, I.L.R. 1937 N. 382: 1937 No. 264.

19. Sanatan Senapati v. E., 1945 P. 489.

20. Nanhak Lal v. Baijnath Agarwala, 1935 P. 474.

21. Jai Bhagwan v. Guttu, 148 I.C.

418: 1934 O. 167; Anis-ul-Rahman Khan v. Beni Ram, 59 P.R. 1901; Ram Dular Teli v. Raj Bahadur Singh, 1939 A.W.R. (B.R.) 4; Mrs. Anwari Jan v. Baldua, 159 I. C. 190; Maniklal Shah v. Hiralal Shaw, 1950 C. 377: 54 C.W.N. 225.

22. Dasaratha Naik v. Gura Bewa, (1971) 1 C.W.R. 339.

23. State v. Jawan Singh, 1971 Cr. L.J. 1656 (Raj.).

24. Jadhar Samal v. Malati Dei, A.I. R. 1971 Orissa 230.

25. Tamiz-ud-Din Sarkar v. Taju, 46 C. 152: 46 I.C. 237; see also Chakravarthi Nainar v. Pushpawati Ammal, 95 I.C. 1005: 1926 M. 985; Shib Deo Misra v. Ram Prasad, 46 A. 637: 87 I.C. 938: 1925 A. 79; Gota v. Kanti Prasad, 1940 R.D. 6; for certified copies of Municipal

certificate does not prove itself and is no proof of age of a person unless the person making the entry or giving information comes forward and connects the entry with the individual concerned.²⁶ Where the birth register is not produced by the party bound to produce it, and a copy of it is filed by the opposite side without objection, it would not be necessary to make out that the conditions mentioned in section 35 or section 32 of the Evidence Act existed. Objection to the admissibility of such copy cannot be taken for the first time in second appeal.²⁷

Evidentiary value of registers of births and deaths.—A death register which is a public document would, in ordinary circumstances, be accepted as almost conclusive.²⁸ Where a village watchman or kotwal makes a report every week of the births and deaths in the village, it may be inferred that the person whose death is reported on a particular date died in the week preceding that date.²⁹ An entry in a death register is, as a rule, reliable to within a few days, and even where the date is not absolutely exact, the entry is often most valuable evidence where the question is as to the relative order in which certain deaths took place.³⁰ But a Court is not bound to accept an entry made in a death register as true and may reject the same if it is not reliable.³¹ An entry in a birth register that a daughter was born to a certain person residing in a certain mohalla is not of much value, where there are other persons of the same name residing in the mohalla.³² A death register is admissible to prove the date of death of the deceased but cannot be used as evidence to prove his age³³ or the cause of his death.³⁴ But in a Sindh case such entry has been assumed to be good evidence of age, though not conclusive.³⁵ An entry in a births register is good evidence of minority.³⁶ Entries in a death register are at best reliable only with regard to the date of death and the fact of death. It is not safe to rely on them for the purpose of proving the religion of the deceased in a case in which the evidence as to his religion is conflicting.³⁷ A statement by a father in a birth register that a child was born to him is evidence of the legitimacy of the child.³⁸ But it is doubtful whether the mere fact of a child being described in the births register as the son of his mother would be any evidence of his illegitimacy.³⁹ Entries of the names of persons in a

registers of births and deaths, see *Jai Bhagwan v. Guttoo*, 148 I.C. 418: 1934 O. 167; *Anis-ul-Rahman Khan v. Beni Ram*, 59 P.R. 1901; *Maniklal Shah v. Hiralal Shaw*, 1950 C. 377: 54 C.W.N. 225; *Manikrao Jairamji v. Deorao Baliram*, 1955 N. 290.

26. *Biseswar Misra v. The King*, 1949 Orissa 22.

27. *Chakravarthi Nainar v. Pushpawathi Ammal*, 95 I.C. 1005: 1926 M. 985; see also *In re Madu Chinnagi Reddi*, 32 I.C. 665: 17 Cr. L.J. 73.

28. *Rangappa Nayakan v. Rangaswami Nayakan*, 88 I.C. 249: 1925 M. 1005.

29. *Bani v. Zamaji*, 103 I.C. 883: 1927 N. 326.

30. *Zaibunissa v. Hasrathunissa*, 52 I.C. 162.

31. *Kalipada Das Karmarkar v. Shashi*

Bhusan Majhi, 128 I.C. 804: 1930 C. 636: 32 Cr. L.J. 184.

32. *Saidunnissa v. Ruqya*, 53 A. 428: 130 I.C. 201: 1931 A. 307.

33. *Tanneru Venkayamma v. Tanneru Gangayya*, 149 I.C. 335: 1934 M. 16; *Maniklal Shah v. Hiralal Shaw*, 1950 C. 377.

34. *Maniklal Shah v. Hiralal Shaw*, 1950 C. 377: 54 C.W.N. 225.

35. *Mst. Shamul v. Dost Mohammad*, 1933 S. 317.

36. *Bharat Basi Naik v. Gopi Nath*, 1941 A. 385: 197 I.C. 866.

37. *Gurusami Nadar v. Irulappa Konar*, 1934 M. 630.

38. *Muhammad Ebrahim v. Safia Bai*, 1937 M.W.N. 1282.

39. *Manicka Mudaliar v. Ammakanu*, 1942 M. 129.

register of births or deaths or marriages cannot be positive evidence of the birth, death or marriage of such persons, unless their identity is fully proved.⁴⁰ The birth certificate does not prove itself and is no proof of age of a particular person, unless the person connected with that entry, either by making it or giving information, comes forward and speaks of the entry and connects the entry with the individual concerned.⁴¹

The Bombay High Court has held that entries of names of persons in a register of births or deaths or marriages cannot be evidence by itself that the entries relate to or prove the births etc., of persons concerned. Evidence must be produced to connect the entries with a person concerned whose birth etc., have to be established.⁴²

Applicability.—Entry of birth date in non-Government School's General Register under Statutory Rules is admissible under section 35. However, its evidentiary value depends on other factors—Kidnapping case Parents of girl not examined as to her age—Entry could not be held to have proved the age.⁴³

Official record of custom; admissibility and evidentiary value of entries in the wajibularzz.—The *wajibularz*, or the village administration paper, is a record of existing customs regarding rights and liabilities in the estate; it is not to be used for the creation of new rights or liabilities. The entries in a *wajib-ul-arz* can be said to express the views of certain revenue authorities as to the rights of the parties or the intention of Government, but the view of the revenue authorities as to the effect or construction of a grant or the intention of Government in respect of a grant do not conclude the matter or bind the civil Courts.⁴⁴ An entry with regard to a custom prevailing in a particular locality, contained in a book compiled by an officer under the orders of the Government, is admissible under this section and is *prima facie* evidence of the existence of the custom recorded therein.⁴⁵ The *wajibularz* is a village administration paper prepared by a village official, in which are recorded the statements of persons possessing interest in the village, relative to existing rights and customs.⁴⁶ It is intended to be an official record of the local customs of the district,⁴⁷ and as such, is admissible in evidence⁴⁸ under this section.⁴⁹ The *wajibularz* is a part of the record.

40. Hemanta Kumar Das. v. Allianz Und Stuttgarter Life Insurance Co., Ltd. 1938 C. 120: 177 I.C. 517; State v. Kamruddin Imamoddin. 1956 N. 74.

41. Biseswar Misra v. The King, 1949 Orissa 22: 50 Cr. L.J. 650: I.L.R. 1949, 1 Cut. 194.

42. Parwatibai v Baiirao, 64 Bom. L.R. 86.

43. Gandhi Vora v. State of Gujarat. A.I.R. 1970 Guj. 178.

44. Rajinder Chand v. Mst. Sukhi, 1957 S.C.J. 119: 1956 S.C.R. 889.

45. Tula Ram Sah Jagati v. Shyam Lal Sah Thulgharia, 49 A. 848: 86 I.C. 729: 1925 A. 648.

46. Murtaza Husain Khan v. Mohammad Yasin Ali Khan, 38 A. 552: 43 I.A. 269: 36 I.C. 299: 1916 P.C. 89; Lali v. Murlidhar, 28 A. 488: 33 I.A. 97 (P.C.); see also Madari

Singh v. Nazim Ali, 105 I.C. 24: 1927 O. 540.

47. Uman Parshad v. Gandharp Singh, 15 C. 20: 14 I.A. 127 (P.C.).

48. Parbati Kunwar v. Chandrapal Kunwar, 31 A. 457: 36 I.A. 125: 4 I.C. 25 (P.C.).

49. Mst. Prem Jagat Kuer v. Harihar Bakhsh Singh, 1946 O. 163; Mehdi Hasan Subedar v. Abdul Wahid, 101 I.C. 820: 1927 O. 608; Baij Nath Singh v. Bahadur Singh, 91 I.C. 583: 1926 O. 101; Lali v. Murlidhar, 28 A. 488: 33 I.A. 97 (P.C.); Muhammad Imam Ali Khan v. Husain Khan, 26 C. 81: 25 I.A. 161 (P.C.); Lekhraj Kuer v. Mahipal Singh, 5 C. 744: 7 I.A. 63 (P.C.); Parbhu Narain Singh v. Jitendra Mohan Singh, 1948 O. 307: 22 Luck. 522.

of-rights. It is unnecessary to produce any witness to prove the *wajibularz*. It is a public document and is admissible in evidence without any formal proof.⁵⁰ Even if the officer compiling the *wajibularz* does not expressly record his opinion as to the existence of a certain custom, but merely records the statements of the zamindars and attests them by his signature and places them in the Government record, he should be presumed to have been satisfied as to the existence of the alleged custom,¹ and the *wajibularz* would be admissible under this section as an official record of the custom,² as well as under section 48, as the record of opinions of persons acquainted with the custom.³ A *wajibularz* prepared and attested according to law is a document of a public character⁴ and is very valuable evidence in support of the custom recorded.⁵ It is good *prima facie* evidence of the custom mentioned in it;⁶ and shifts the onus of proving to the contrary to the other side.⁷ It is not necessary to corroborate the entry in the *wajibularz* by proof of instances⁸ and, if there is no evidence to the contrary, the entry in the *wajibularz* may be accepted as sufficient proof of the custom.⁹ But the *wajibularz* only creates a presumption in favour of the existence of the custom recorded in it, and this presumption may be rebutted by intrinsic or extrinsic evidence to the contrary.¹⁰ Where there is evidence which satisfies the Court that, in fact, the *wajibularz* cannot reasonably be treated as the record of a custom, the presumption in favour of the custom recorded in it is rebutted; such evidence may be found in the language of the *wajibularz* itself or there may be external evidence.¹¹ Where a *wajibularz* contains matters which cannot properly or possibly be the subject of a custom, then the ordinary presumption that it is a *prima facie* record of a custom is overturned by the internal evidence afforded by the other terms embodied therein though they may be separable from the rest.¹² A Settlement Officer should not receive for entry in the *wajibularz* of a village a mere expression of the views of a proprietor, or enter it upon

50. *Fajju v. Sirya*, 170 I.C. 392: 38 Cr. L.J. 881: 39 P.L.R. 491.

1. *Lekhraj Kuar v. Mahipal Singh* 5 C. 744: 7 I.A. 63 (P.C.).

2. *Ibid.*

3. *Mst. Prem Jagat Kuer v. Harihar Bakhsh Singh*, 1946 O. 163; *Lekhraj Kuar v. Mahipal Singh*, 5 C. 744: 7 I.A. 63 (P.C.); *Lali v. Murli-dhar*, 28 A. 488: 33 I.A. 97 (P.C.).

4. *Ali Nasir Khan v. Manik Chand*, 25 A. 90; *Mst. Amina Khatun v. Khalilur-rahman Khan*, 8 Luck. 445: 1933 O. 246.

5. *Murtaza Husain Khan v. Mohammad Yasin Ali Khan*, 38 A. 552: 43 I.A. 269: 36 I.C. 299: 1916 P.C. 89, *Balgobind v. Badri Prasad*, 45 A. 413: 50 I.A. 196: 74 I.C. 449: 1923 P.C. 70; *Sher Muhammad Khan v. Dost Muhammad Khan*, 78 I.C. 451: 1925 L. 231.

6. *Tula Ram Sah Jagati v. Shyam Lal Sah Thulgharia*, 49 A. 848: 86 I.C. 729: 1925 A. 648; *Lalchand v. Ram Chand*, 46 A. 674: 82 I.C. 526: 1924 A. 753; *Sher Muhammad Khan v.*

Parbhu Lal, 46 A. 47: 79 I.C. 41: 1924 A. 274; *Gayan Singh v. Babu Lal*, 79 I.C. 438: 1924 A. 86; *Ali Nasir Khan v. Manik Chand*, 25 A. 90.

7. *Sher Muhammad Khan v. Dost Muhammad Khan*, 78 I.C. 451: 1925 L. 231; *Ali Nasir Khan v. Manik Chand*, 25 A. 90.

8. *Sher Muhammad Khan v. Parbhu Lal*, 46 A. 47: 79 I.C. 41: 1924 A. 274.

9. *Fazal Hussain v. Muhammad Sharif*, 36 A. 471: 24 I.C. 464.

10. *Lalchand v. Ram Chand*, 46 A. 674: 82 I.C. 526: 1924 A. 753.

11. *Sher Muhammad Khan v. Parbhu Lal*, 46 A. 47: 79 I.C. 41: 1924 A. 274; *Gayan Singh v. Babu Lal*, 79 I.C. 438: 1924 A. 36.

12. *Lalchand v. Ram Chand*, 46 A. 674: 82 I.C. 526: 1924 A. 753; *Randhir Singh v. Rajpal Singh*, 46 A. 478: 81 I.C. 25: 1924 A. 321 (F.B.); *Balwant Singh v. Mare Singh*, 74 I.C. 322: 1924 A. 52.

the records relating to that village.¹² A **jamabandi** is not a proper document to record custom. Such entries should be made in the **dastur dehi** or the **wajibularz**.¹⁴ The district of Banaras is a permanently settled district, but in 1883 there was a revision of settlement in that district in the course of which a document called **halat-i-dehi** was prepared in place of a regular **wajibularz**. An entry in this document as to an existing custom is, therefore, relevant under section 35.¹⁵ An entry in a **wajibularz** is not inadmissible merely because under a Settlement Circular it was not necessary for the Settlement Officer to record the entry.¹⁶

Official record of custom; admissibility and evidentiary value of entries in the riwaj-i-am.—No statutory presumption attaches to the contents of a **Riwaj-i-am** or similar compilation.¹⁷ The **riwaj-i-am** is a record of custom prepared by a public officer in the discharge of his duties and is, therefore, admissible in evidence under this section in proof of the custom recorded therein.¹⁸ The principle upon which an entry in a **riwaj-i-am** is admitted as a piece of evidence is that it is an official record kept by a person upon whom there is a public duty to make entries in it only after satisfying himself of the truth of those entries, and accordingly the document itself is evidence of the truth of its contents.¹⁹ The Privy Council has held that statements contained in the **riwaj-i-am** and in the Manuals of Customary Law issued by authority form a strong piece of evidence in support of the custom, even if unsupported by instances.²⁰ But the evidence afforded by the **riwaj-i-am** or the Manuals of the Customary Law is not conclusive and it is always open to the other side to rebut it.²¹ An entry in a **riwaj-i-am** recording a special custom as opposed to a general custom is **prima facie** proof of that custom, even if it be unsupported by concrete instances, and the onus is on the other side to show that the custom is not as recorded in the **riwaj-i-am**.²² Though the entries in the **riwaj-i-am** are entitled to an initial presump-

13. Uman Parshad v. Gandharp Singh, 15 C. 20: 14 I.A. 127 (P.C.).
14. Mohammad Asghar Ali Khan v. Rammon, 71 I.C. 432: 1923 A. 378.
15. Sri Lal Goika v. Kesho Das, 87 I.C. 368: 1926 A. 83.
16. Prem Jagat Kuer v. Harihar Baksh Singh, 1946 O. 163: 1946 O. W.N. 26.
17. Gokal Chand v. Parvin Kumari, 1952 S.C. 231: Narain Singh v. Kapur Singh, 1953 Punj. 196: 55 P. L.R. 25.
18. Subhani v. Nawab, 1941 P.C. 21: 1 L.R. 1941 L. 154; Basant Singh v. Brij Rai Saran Singh, 1935 P.C. 132: 156 I.C. 864; Labh Singh v. Mango, 8 L. 281: 100 I.C. 924: 1927 L. 241; Naraini v. Jowahir Singh, 89 I.C. 724: 1926 L. 142; Beg v. Allah Ditta, 45 P.R. 1917: 44 C. 749: 44 I.A. 89: 38 I.C. 354: 1916 P.C. 129; Naarin Singh v. Kapur Singh, 1953 Punj. 196: 55 P.L.R. 25; Gokal Chand v. Parvin Kumari, 1952 S.C. 231.
19. Subhani v. Nawab, 1941 P.C. 21: 1 L.R. 1941 L. 154; Aisha Bibi v. Begum Bibi, I.L.R. 1939 Kar. 475: 1939 S. 263; Basant Singh v. Brij Rai Saran Singh, 1935 P.C. 132: 156 I.C. 864; Labh Singh v. Mango, 8 L. 281: 100 I.C. 924: 1927 L. 241.
20. Vaishno Ditti v. Rameshri, 10 L. 86: 55 I.A. 407: 113 I.C. 1: 1928 P.C. 294; see Harnam Singh v. Mst. Bhagi, 16 L. 1007: 1936 L. 261: 161 I.C. 916; Beg v. Allah Ditta, 45 P.R. 1917: 44 C. 749: 44 I.A. 89: 38 I.C. 354: 1916 P.C. 129.
21. Jwala Singh Sant Singh v. The Province of Punjab, 1948 E.P. 59: 50 P.L.R. 113.
22. Saligram v. Maya Devi, 1955 S.C. 266; Khan Beg v. Fateh Khatun, 13 L. 276: 135 I.C. 769: 1932 L. 157; Sardar Shah v. Sardar Begum, 113 I.C. 44: 1928 L. 893; Labh Singh v. Mango, 8 L. 281: 100 I.C. 924: 1927 L. 241, dissenting from Gurdit Singh v. Malan, 5 L. 364: 84 I.C. 171: 1925 L. 35; Budha v. Fatima Bibi, 4 L. 99: 76 I.C. 921: 1923 L. 401; Manohar v. Nanhi, 2 L. 366: 66 I.C. 399: 1922 L. 320, and Khuda Bakhsh v. Fatteh Khatun, 13 P.R. 1919: 46 I.C. 679.

tion in favour of their correctness, irrespective of the question whether or not the custom as recorded is in accord with the general custom, the quantum of evidence necessary to rebut this presumption would, however, vary with the facts and circumstances of each case. Where, for instance, the *riwaj-i-am*, lays down a custom in consonance with the general agricultural custom of the province, very strong proof would be required to displace this presumption. But where, on the other hand, this is not the case and the custom as recorded in a *riwaj-i-am* is opposed to the rules generally prevalent, the presumption would be considerably weakened. Likewise, where the *riwaj-i-am* affects adversely the rights of females who had no opportunity whatever of appearing before the revenue authorities, the presumption would be weaker still, and only a few instances would suffice to rebut it.²³

Entries in *Riwaj-i-am* in conflict with general custom recorded in Rattigan's Digest—The former should prevail.—There is, an initial presumption of correctness as regards the entries in *Riwaj-i-am* and when the custom as recorded in the *Riwaj-i-am* is in conflict with the general custom as recorded in Rattigan's Digest or ascertained otherwise, the entries in the *Riwaj-i-am* should ordinarily prevail except that as was pointed out by the Judicial Committee of the Privy Council in a recent decision in *Mst. Subhani v. Nawab*, A.I.R. 1951 P.C. 21, that where the *Riwaj-i-am* affects adversely the rights of female who had no opportunity whatever of appearing before the revenue authorities, the presumption would be weak, and only a few instances would suffice to rebut it.²⁴

Other official records of custom.—Reference may legitimately be made to the work of Mr. Crookes on Castes and Tribes of the North-Western Provinces and Oudh, prepared at the instance and published by the authority of the Government of that province.²⁵ Mr. Panna Lal's book on Local Kumaon Custom is relevant and valuable evidence of the customs it recites.²⁶

Records of Rights, settlement, survey and other revenue records.—A Record of Rights is a public record prepared by public officers appointed under the statutory authority of the Local Government and is, therefore admissible under section 35,²⁷ and presumptive evidence of its contents.²⁸ It is, however, not conclusive evidence of title.²⁹ An entry in

23. *Saligram v. Maya Devi*, 1955 S.C. 266; *Subhani v. Nawab*, 1941 P.C. (1960) 2 Punj. 615 (S.C.).
24. *Jai Kaur v. Sher Singh*, I.L.R. (1960) 2 Punj. 615 (S.C.).
25. *Mariam Bibee v. Muhammad Ibrahim*, 48 I.C. 561; 28 C.L.J. 306.
26. *Behari Lal v. Har Lal Shah*, 153 I.C. 556; 1934 A. 984; *Tula Ram Sah Jagati v. Shyam Lal Sah Thulgharia*, 49 A. 848; 86 I.C. 729; 1925 A. 648.
27. *Gangabai Kom Baswantrao Desai v. Fakirgowda Somappagowda Desai*, 54 B. 336; 57 I.A. 61; 123 I.C. 166; 1930 P.C. 93; *Fazlar Rahaman Biswas v. Golam Kader Mea*, 96 I.C. 959; 1926 C. 862; *Bibi Waki-lan v. Deonandan Prosad*, 59 I.C. 298; 1921 P. 268; see *Akubali v. Najamali*, 50 C.W.N. 382; *Abdul Rasheed v. Jogesh Chandra Roy*, 11 C.W.N. 153.
28. *Ghasi Sahu v. Shib Sahu*, 1942 P. 140; *Fazlar Rahman Biswas v. Golam Kader Mea*, 96 I.C. 959; 1926 C. 862; *Indian Iron & Steel Co. v. Bara Gopal Thakur*, 1935 C. 641; *Harihar Sahu v. Tikait Sheo Prasad Singh Deo*, 1954 P. 173.
29. *Rakhialkhan Khan Muhammad v. Chothiram Kaliandas*, 1944 S. 176; I.L.R. 1944 Kar. 14; *Vassandmal Davaldas v. Hiromal Mohanmal*, 1947 S. 94; *Sakharam Shriniwas v. Shushilabai Namdeo*, 1953 N. 339; *Brij Bhukhan Kalwar v. S.D.O. Siwan*, 1955 P. 1; *Ammar Ahmad Khan v. Union of India*, 1955 Punj. 27;

a Record of Rights, of a matter not required to be recorded therein, e.g., an entry as to the existence of a local custom, is admissible.³⁰ In other cases, however, such unauthorised entries have been held to be inadmissible.³¹ An entry in a Record of Rights that the tenant claimed to hold adversely to the landlord is not only admissible under this section, but is a very good piece of evidence of an assertion of adverse title.³² A draft Record of Rights is admissible to rebut the presumption of the correctness of Record of Rights,³³ though itself it carries no presumption of correctness and can be used merely to show the nature of the entry before the final publication.³⁴ Settlement records,³⁵ e.g., settlement pedigrees,³⁶ settlement *khewats*,³⁷ settlement *khataunis*,³⁸ and village notes prepared by Settlement Officers,³⁹ are relevant under this section so are *jamabandis*,⁴⁰ boundary papers,⁴¹ *fards bachh*,⁴² *fards riwai bhaoli*,⁴³ and other revenue records.⁴⁴ A survey record is properly admissible in evidence and an entry in it carries a presumption of correctness which may, however, be rebutted by contrary proof.⁴⁵ An *abadi khasra* prepared by the *Amin* when the Sub-Divisional Officer ordered a survey of the cultivated area of the village at the instance of the Nazul Officer is admissible under section 35.⁴⁶ Sifton's Settlement Report con-

30. Suresh Ch. Rai v. Sitaram Singh, 57 I.C. 126.
31. See note to this section under the heading "entry in an official register or record made in excess of official duty, whether admissible?"
32. Sohawa Singh v. Kesar Singh, 13 L. 432; 140 I.C. 474; 1932 L. 586, per Bhide, J.
33. Chand Ray v. Bhagawati Charan Goswami, 2 P. 314; 81 I.C. 326; 1924 P. 248; Ranranbijaya Prasad v. Naubat Rai, 1942 P. 346; but see Saroop Rai v. Srinkant Prasad, 55 I.C. 922; see also Ambar Ali v. Lutfi Ali, 45 C. 159; 41 I.C. 116; Gulab Kuer v. Ram Ratan Pandey, 27 I.C. 229; 18 C.W.N. 896.
34. Hardeo Narayan Singh v. Kapil Singh, 108 I.C. 417; 1928 P. 353.
35. Raja Brajasunder Deb. v. Raja Rajindranarain, 1941 P. 260 (such record carries a presumption of correctness); Ghulam Rasul Khan v. Secretary of State, 6 L. 268; 52 I.A. 201; 86 I.C. 654; 1925 P.C. 170; Raghunandan Ramanuja Das v. Bibhuti Bhushan Mukherji, 39 C. 304; 12 I.C. 147.
36. Sarfaraz Khan v. Rajana, 4 Luck. 39; 112 I.C. 834; 1929 O. 129; Baij Nath Singh v. Rajju Singh, 91 I.C. 583; 1926 O. 101; Sarju Dei v. Ram Harakh, 18 I.C. 250.
37. Pratap Chandra Deo Dhabal Deb v. Jagdish Chandra Deo Dhabal Deb, 82 I.C. 886; 1925 C. 116; Skinner v. Chandan Singh, 31 A. 247; 2 I.C. 215; see also Kumar Kamakhya Narain Singh v. Abhi-man Singh, 13 P. 589; 150 I.C. 807; 1934 P.C. 182.
38. Skinner v. Chandan Singh, 31 A. 247; 2 I.C. 215.
39. Ghasi Sahu v. Shib Sahu, 1942 P. 140; Ganjhu Upendra Singh v. Surjan Singh 8 P. 266; 120 I.C. 756; 1929 P. 328; Sheo Bahadur Singh v. Bishwanath Saran Singh, 2 Luck. 4; 99 I.C. 876; 1927 O. 74; Bhagwan Singh v. Lachuman Prasad Sahu, 90 I.C. 579; 1925 P. 754; Sri Lal Goika v. Kesho Das, 87 I.C. 368; 1926 A. 83; but see Kedar Nath Goenka v. Amrit Mandal, 88 I.C. 676; 1925 P. 568.
40. Taru Patu v. Abinash Chunder Dutt, 4 C. 79; Sri Lal Goika v. Kesho Das, 87 I.C. 368; 1926 A. 83; Yadgar Husain v. Mohammad Ibrahim Raza, 1936 N. 71; 163 I.C. 179.
41. Haradas Acharjya Chowdhuri v. Secretary of State, 43 I.C. 361; 1917 P.C. 86; 26 C.L.J. 590.
42. Malik Mahmud v. Khushi Ram, 131 I.C. 638; 1931 L. 605.
43. Sheo Prasad Singh v. Lal Babu, 39 I.C. 505; Tulsi Mahton v. Jhandoo Pandey, 38 I.C. 176.
44. Ghulam Rasul Khan v. Secretary of State, 6 L. 269; 52 I.A. 201; 86 I.C. 654; 1925 P.C. 170; Maung Po Lun v. Ma E. Mai, 74 I.C. 47; 1923 R. 57.
45. Kumar Kamakhya Narain Singh v. Abhiman Singh, 13 P. 589; 150 I.C. 807; 1934 P.C. 182; see also notes to section 36.
46. Phakkar v. Pragi, 154 I.C. 570; 1935 O. 268.

taining the statement that 'dwami thicas', being in their origin cultivating tenancies, are, by custom, non-transferable, is admissible in evidence to prove the custom of the non-transferability of "dwami thicas."⁴⁷ The decision of a **khanapuri** Officer recorded in settlement proceedings is admissible to prove an admission embodied in the decision.⁴⁸

The West Pakistan High Court has held that **Khasra** and **Shajra Abadi** of a village prepared in 1860 fall under section 35.⁴⁹

Record of rights.—Order under Record of Rights Act directing name of respondent to be entered in the record.—Order is by no means conclusive. It is always open to petitioner to institute a suit to establish his title. In that suit such order can have no effect since title will be decided therein on evidence provided by parties.⁵⁰

A **jamabandi** prepared by the landlord is admissible to show that since the creation of the tenancy, rent has been assessed and that such assessment was on the basis of a certain area.¹ But an entry as to the existence of a custom should not find place in a **jamabandi**.² A register of **minhaidari** villages is an official document and is admissible in evidence, unless any portion of it is shown to be prepared in excess of official duty.³ A record of the rates of rent in the **rubkars** prepared by a revenue authority on an inquiry under the Bengal Land Revenue Settlement Regulation, VII of 1822, is made by the officer in the performance of a duty imposed upon him by the Regulation and is, therefore, admissible in evidence.⁴ Entries in **mahalwar** registers kept under section 4 of Act VII of 1876,⁵ papers prepared by the **patwari** showing how much land has been cultivated and how much is lying fallow,⁶ and an estimate of the income of a crop made by a Revenue Officer,⁷ are relevant under this section. The index to a lost survey register is admissible under this section;⁸ so is an entry in a **mauzawari** register⁹ or a register of **par-gana watandars**.¹⁰ **Khasra girdawaris** are public documents and can properly be proved by the production of certified copies. They are also admissible under section 35.¹¹ Entries made in village papers by a **patwari** are admissible under this section.¹² Where the **patwari** instead of making the

47. *Somar Ram v. Budhu Ram*, 1937 P. 463: 171 I.C. 115.

48. *Khedu Mahto v. Khonka Mahto*, 1939 P. 591.

49. P.L.D. 1960 Lah. 504.

50. *Payappa Nemanna v. Chamu Appoyya*, (1969) 2 Mys. L.J. 198.

1. *Sib Sahai Lal v. Bijai Chand Mahatab*, 5 P. 151: 90 I.C. 862: 1926 P. 197.

2. *Mohammad Asghar Ali Khan v. Rammon*, 71 I.C. 432: 1923 A. 378.

3. *Raj Kishore Deo v. Bani Mahto*, 47 I.C. 1: 1917 P.C. 197.

4. *Deonarayan Singh v. Dwarka Prasad Singh*, 109 I.C. 136: 1928 P. 429.

5. *Mutsaddi Mian v. Mahomed Idris*, 34 I.C. 283: 1915 P.C. 177.

6. *Sitaram v. Himatrao*, 90 I.C. 38: 1926 N. 161.

7. *Ganpatji v. Hanuman Singh*, 54 A.

125: 137 I.C. 255: 1932 A. 196.

8. *Hiralal Ranchhoddas v. Secretary of State*, 134 I.C. 721: 1931 B. 436; *Sarat Chandra Dass v. Sm. Sarojini Rudraja*, 1924 C. 135: 79 I.C. 257; *Secretary of State v. Chimanlal*, 1942 B. 161: I.L.R. 1942 B. 357 (printed copy of Index-register).

9. *Secretary, Cantonment Committee, Barrackpore v. Satish Chandra Sen*, 58 C. 858: 57 I.A. 339: 130 I.C. 616: 1931 P.C. 1.

10. *Malappa v. Tukko*, I.L.R. 1937 B. 464: 1937 B. 307: 170 I.C. 801.

11. *Mohammad Din v. Fateh Din*, 151 I.C. 786: 1934 L. 698; *Abdul Baqi v. Fakhr-ul-Islam*, 1937 P. 333: 170 I.C. 187; *Jagan Koeri v. Chairman, Gaya Municipality*, 1937 P. 567.

12. *Shyam Lal v. Ishwari Dayal*, 1939 B.D. 325.

entry with respect of **nazrana** in the remarks column of the **jamabandi** has made the entry in the **fahrist tabdilal** which he submits to the same authority at the same time, it is a mere irregularity in making the entry in one place rather than another and does not invalidate the entry. The **fahrist** is admissible even if the **patwari** has not been called.¹³ In order to prove a mutation, it is not necessary to call the Revenue Officer who sanctioned it.¹⁴ **Khasra paimaish** prepared under the orders of Government is relevant under this section.¹⁵ Entries in the record of right prepared for **deara** purposes are a valuable piece of evidence.¹⁶

Evidentiary value of settlement records.—Patta of property in settlement records by itself cannot confer title to property. It is of consequence in adjudicating the proprietary right in respect of property in a suit for possession.¹⁷

Where entries are made in the **Khasra Register**, which is a public and official register and made by a public servant in the discharge of his official duties, and maintained under a certain law, and the columns provided in such registers are to be filled up in the discharge of official duties of the public servant concerned, till they are proved to be false, they have to be taken as good evidence of what is stated therein.¹⁸

Evidentiary value of revenue records.—Revenue records are not evidence of title, for they are kept for fiscal purposes; but when the facts recorded are facts which it is the duty of the Revenue Officer to record, then his record is evidence of those facts.¹⁹ On questions of title, the evidentiary value of revenue records varies with the circumstances; where entries in them are made after a most careful public inquiry, they are cogent evidence of the facts recorded, though not conclusive.²⁰ Where, from an entry in a revenue register, the foundation source of the right can be traced, it is not safe to rely upon the entry itself, but recourse must be had to the origin of the entry.²¹ The presumption of correctness which attaches to the finally published Record of Rights relates only to possession at the time when the Record was prepared.²² An entry in the record-of-rights is not a foundation of title, but is a mere piece of evidence.²³ Entries made in such Government records as the Record of Rights are evidence of title mainly because they are good evidence of possession, but if contrary to the facts as to possession at the time when they were made, they carry little, if any, weight. This would be specially applicable to entries made by the **Tehsildar** as of routine and without notice to any parties interested to oppose their being made.²⁴

13. *Devisingh Umraosingh v. Dharma Bhura Nayak*, 1944 N. 314.

14. *Mst. Atri v. Rodhal*, 1936 L. 864.

15. *Pratap Singh v. Ganesh Das*, 40 P.L.R. 298.

16. *Akubali Hooladar v. Najemali Howladar*, 1946 C. 326.

17. *Mammed Kunhi v. Lakshmana Pai*, 1969 Ker. L.R. 894.

18. *Sheojee v. Pramakuer*, 1964 B.L.J. R. 152.

19. *Bibi Sahibzadi v. Mir Mohamad*, 32 I.C. 548; *Salabat Mahatab v. Malati Mahatani*, 1954 P. 481.

20. *Gangabai Kom Baswantrao Desai*

v. Fakirgowda Samappagowda Desai, 54 B 336; 57 I.A. 61; 123 I.C. 166; 1930 P.C. 93.

21. *Pirtha Singh v. Mohammad Ali Mohammad Khan Bahadur*, 94 I.C. 188; 1926 O. 427.

22. *Nayan Mandal v. E.*, 115 I.C. 746; 1930 C. 134; 31 Cr. L.J. 918.

23. *Sakharam Shrinivas v. Shushilabai*, 1953 N. 339; *Wali Mohammad v. Mohammad Baksh*, 1930 P.C. 91.

24. *Maharaja Sir Kesho Prasad Singh v. Bahuria Mst. Bhagjogna Kuer*, 1937 P.C. 69; 16 P. 258; 167 I.C. 329.

An entry in a Record of Rights operates in the same way between landlord and tenant as between landlords of the same or of neighbouring estates, or between tenant and tenant. The entry must be presumed to be correct until it is shown by evidence to be incorrect.²⁵ Revenue records prepared under the Land Revenue Acts are presumed to be correct unless shown by evidence to be otherwise.²⁶ An entry in the *khewat* is *prima facie* evidence of title.²⁷ It is not any part of the law of India that settlement records are by themselves conclusive evidence of the facts which they purport to record. They have merely to be considered with other evidence in the case.²⁸ Where the question is as to the tribe to which a party belongs, the fact that he is mentioned as belonging to that tribe in the earliest revenue records is good evidence of his belonging to that tribe. In a pedigree case, statements contained in public documents are receivable to prove the facts stated, on the general ground that they were made by the authorized agents of the public in the course of official duty and respecting facts which were of public interest or required to be recorded for the benefit of the community. In most cases, after a lapse of years, it would be impossible to give evidence that the statements contained in such documents were in fact true, and it is for this reason that this exception is made to the rule of hearsay evidence.²⁹ Where an entry in a particular settlement is opposed to entries in the two previous settlements, it must be considered to be unauthorized, where there is nothing on the record to show why the entry of the two previous settlements was substituted by that in the third.³⁰ An entry in a Government register showing payment of revenue by a person does not necessarily imply his title to the property.³¹ A definition of shares in revenue and village papers affords by itself but a very slight indication of an actual separation.³² Entries in revenue records showing certain land to be a thoroughfare, are relevant for the purpose of showing that the land in dispute was used as a thoroughfare when the entries were made.³³ Entries made in a *khasra*, being entries made in an official record, by public officers in the discharge of their duties, are themselves relevant facts and may be considered by the courts as evidence of possession, from which the courts may, if they think fit, draw an inference as to title.³⁴ *Hudabandi* papers are to be accepted as *prima facie* accurate between Government and the zamindars; and the boundaries given therein

25. *Nitai Lal Dutta v. Govinda Bhushan Sen*, 1936 P. 142; *Mazharul Ekbal v. Gopal Lal Ray Bahadur*, 84 I.C. 488: 1924 P. 719.

26. *Durga v. Ram Padarath*, 65 I.C. 749.

27. *Ghulam Muhammad v. Sabit Ali*, 69 I.C. 821: 1922 O. 140; *Nageshar Bakhsh Singh v. Ganesha*, 42 A. 368: 47 I.A. 57: 56 I.C. 306: 1920 P.C. 46; see also *Muhammad Habibuddin v. Mohd. Wazeul Haq*, 1933 P. 555 (2).

28. *Nageshar Bakhsh Singh v. Ganesha*, 43 A. 368: 47 I.A. 57: 56 I.C. 306: 1920 P.C. 46; as to the evidentiary value of Settlement Registers of 1876, see *Srinivasa Chariar v. Evalappa Mudaliar*, 45 M. 565: 49 I.A. 237: 68 I.C. 1: 1922 P.C. 325.

29. *Ghulam Rasul Khan v. Secretary of State*, 6 L. 269: 52 I.A. 201: 86

I.C. 654: 1925 P.C. 170; but see *Sarabjit Singh v. Court of Wards, Rampur Mathra Estate*, 37 I.C. 27.

30. *Budha Khan v. Mohammad*, 31 I.C. 287: 133 P.W.R. 1915.

31. I.P.L.T. 602.

32. *Nageshar Bakhsh Singh v. Ganesha*, 42 A. 368: 47 I.A. 57: 56 I.C. 306: 1920 P.C. 46; *Kartar Singh v. Lona*, 113 I.C. 773: 1929 L. 74; *Durga Prasad v. Ghansham Das*, 1948 P.C. 210: 1948 A.L.J. 279: 61 M.L.W. 517: 1948, 2 M.L.J. 226: 50 B.L.R. 669: 53 C.W.N. 113; *Brajraj Singh v. Yogendrapal*, 1952 M.B. 146.

33. *Megh Raj v. Municipal Committee, Abohar*, 1936 L. 921.

34. *Jagan Koeri v. Chairman, Gaya Municipality*, 1937 P. 567: 171 I.C. 732.

ought to be regarded as the boundaries of the grant.³⁵ The orders of Settlement Courts and *Rubkars akhir*, containing a summary of all the proceedings, prepared and kept on the settlement files, are admissible to show that a sanad was granted to the persons named therein.³⁶

In case of discrepancy in the *jamabandi* and *wajibularz* entries in the latter must prevail.³⁷

Where the entry in the record-of-rights shows that the suit lands stood in the name of the plaintiff, the onus rests on the defendant to prove that the said entry is in favour of the plaintiff is not correct.³⁸

It is the entry in the Record of rights and not the entry in the Tenancy Register that has a presumptive value.³⁹

Revenue register.—It affords no evidence on question of title.⁴⁰

More than one record of rights.—In case of conflict between an earlier entry in the Cadastral Survey Record of Rights and a subsequent entry in the Revisional Survey Record of Rights, the latter entry must prevail.⁴¹

Recital of alienation or partition in a revenue record, whether evidence of alienation or partition?—Entries in revenue records reciting the fact of an alienation⁴² or partition⁴³ having taken place are relevant, though they may not be sufficient to prove the alienation. Where the question in dispute is whether an alienation took place or not, an entry in a revenue register, relating to the alienation is a relevant fact under section 35 of the Evidence Act. Where an entry in a revenue register shows that the parties made a report of an alienation having taken place, the entry does not prove the alienation or the ownership of the alienor at the time the report was made, but it creates a presumption that a report of the alienation, in the terms recorded, was made by the parties.⁴⁴

Inam Registers.—The Inam Register is a great act of State and is entitled to very great weight.⁴⁵ Entries in Inam registers are not conclusive, but are strong piece of evidence not to be lightly disregarded excepting for solid and substantial reasons or on account of other rebutting or

35. *Rajnandini Debi v. Manmatha Pal*, 1941 C. 223: I.L.R. 1940: 2 C. 393: 197 C. 147.

36. *Parbhu Narain Singh v. Jitendra Mohan Singh*, 1948 O. 307: 22 Luck. 522.

37. *Manturabai v. Ithal Chiman*, 1954 N. 103.

38. *Ramkrishna v. Arjuno*, A.I.R. 1963 Orissa 29.

39. *State v. Bharat Singh*, 1961 (1) Cr. L.J. 649.

40. *Shahim v. Ganesh*, 1961 M.P. L.J. 105.

41. *Durga Singh v. Tholw.* 1963 (2) S.C.J. 306, 1963 (2) S.C.R. 693.

42. *K. Po Maung v. Ma Mein Gale*, 1 R. 562: 77 I.C. 380: 1924 R. 135.

43. *Maung Po Lun v. Ma E Mat*, 74 I. C. 47: 1923 R. 57.

44. *Maung Hlaing v. Maung Chit Su*, I.R. 135: 76 I.C. 449: 1923 R. 196.

45. *Arunachellam Chetty v. Venkatachalapathi Guru Swamigal*, 43 M. 253: 46, I.A. 204: 53 I.C. 288: 1919 P.C. 62; *Kandalam Krishnama-charylu v. Sathulari Vijayasarithi*, 88 I.C. 646: 1925 M. 823; *Kondavitti Brahmayya v. Rajeswaraswami Temple*, 1953 M. 580: 1953 M. W.N. 45: 1953, 1 M.L.J. 164.

contrary evidence.⁴⁶ The Register embodies the conclusions of the Inam Commissioner on such inquiry as he chooses to make upon the statements filed before him. The presumption is that the Register embodies the findings of the Inam Commissioner after such investigation. There is no rule prescribing the extent of the investigation to be made by him.⁴⁷

In the absence of the original grant, the Inam Register has great evidentiary value, yet the entry or entries in any particular column or columns in the register should not be accepted at their face value, without giving due consideration to other matters recorded in the entry itself. And the entries in the Inam Register cannot displace actual or authentic evidence in individual cases.⁴⁸

Value of entries in Inam Register.—The fact that in the absence of the original grant, the Inam Register is of great evidentiary value, does not mean that the entry or entries in any particular column or columns be accepted at their face value without giving due consideration to other matters recorded in the entry itself.⁴⁹

Quinquennial Registers.—The Quinquennial Register is a register kept by the Collector under Regulation XLVIII of 1973. Such register is admissible under section 35 of the Evidence Act.⁵⁰ The mere fact that a taluq is not entered in the Quinquennial Register is not sufficient to rebut the presumption arising under section 50 of the Bengal Tenancy Act.¹

Register of sarsikan papers.—A register of sarsikan papers maintained in a Collectorate is a public document and, therefore, entries therein are relevant under section 35 of the Act and provable by certified copies.² A sarsikan paper prior to the permanent settlement of 1790 and shortly before it is evidence of the fact that rent had varied; if alone, it is of little value as such, but its value is enhanced in combination with quinquennial fahrist.³

Presumption of public temple in Madras State and nearabouts.—In the greater part of the former Madras Presidency, where private temples were practically unknown, the presumption is that temples and their endowments form public charitable trusts. The presumption is certainly rebuttable.⁴

46. Harihar Mahapatra v. Hari Otha, 1950 Orissa 257.

47. Kundalam Krishnamacharylu v. Sathulari Vijayasarithi, 88 I.C. 646: 1925 M. 823.

48. Sadavarthy v. Commissioner, Hindu, R.C. Endowments, (1962) Supp. (2) S.C.R. 276.

49. Poohari Fakir Sadavarthy v. Commissioner of Hindu Religious and Charitable Endowments, 1962 (Sup.) (2) S.C.R. 276: 1962 S.C.D. 648.

50. Hem Chandra Ray Choudhury v. Benayakdas Acharji Choudhury, 86 I.C. 538: 1925 C. 1037; Ramnandan Sahay v. Jaogovind Pandey, 2 P.

839: 75 I.C. 955: 1924 P. 213; Secretary of State v. Wazed Ali Khan Pani, 65 I.C. 866: 1921 C. 687.

1. Hem Chandra Ray Choudhury v. Benayakdas Acharji Choudhury, 86 I.C. 538: 1925 C. 1037.

2. Rajendra Narayana Singh Deo v. Bihari Lal Chakravarty, 11 P. 569: 138 I.C. 419: 1932 P. 157.

3. Dinanath Mahatha v. Jyoti Prasad Singh & Co., 1936 P. 400: 163 I.C. 971.

4. Poohari Fakir Sadavarty v. Commissioner of Hindu Religious and Charitable Endowments, 1962 (Sup) 2 S.C.R. 276, 1962 S.C.D. 648.

Diglott Register.—Diglott Register entries are relevant evidence, but not on title. Though the entries in the Diglott register may be evidence, they are, by themselves, not conclusive evidence of the facts which they purport to record. It may turn out that they are in accord with the general bulk of the evidence in the case and they may supply gaps in it. When viewed in the light of other compelling circumstances from which inference contrary to such entries can be drawn, they may become unimportant and their value insignificant.⁵

Value of recitals in an ancient document.—The recital of the Ekrar-nama and its terms in an ancient public document like the Rubakari whose authenticity has not been, nor indeed could be, doubted furnishes strong evidence of the existence and genuineness of the settlement arrived at by the parties.⁶

Chittahs.—A chittah prepared by a zamindar, recording the suit land as being in the possession of tenants, is not admissible under sections 35 and 36, as it was not prepared by a public servant.⁷

Partition or batwara papers.—There has been a good deal of conflict of judicial opinion as to the admissibility of what are commonly known as "partition papers". In some cases they have been held to be admissible,⁸ while in others the verdict has been against their admissibility.⁹ The admissibility of these papers depends upon several considerations, viz., the nature of the document, the circumstances in which and the person by whom it was prepared, the persons in whose presence it was prepared, and the use to which it is sought to be put.¹⁰ A batwara barawada prepared by a Deputy Collector under Chapter VII of Act VIII of 1876 (Bengal Estates Partition Act) is a document prepared by a public servant in the discharge of his official duty and is, therefore, admissible under this section;¹¹ but a batwara khasra is not so admissible,¹² nor a batwara chittah.¹³ Batwara papers are very valuable evidence if they contain any admission by the persons concerned in the batwara proceedings.¹⁴ They may be admitted in evidence also against the parties to the

5. Ramanna v. Sambamoorthy, A.I.R. 1961 Andhra Pradesh 351.

6. Bishwambhar Singh v. State of Orissa, 1954 S.C.R. 842: 1954 S.C. J. 219.

7. Abdul Khaleque v. Sushil Chandra Chaudhuri, (1935) 39 C.W.N. 330.

8. See Anund Chunder Roy v. Haronath Roy, 4 W.R. 26; Taru Patur v. Abinash Chunder Dutt, 4 C. 79; Saraswati Dasi v. Dhanpat Singh, 9 C. 431, per Field, J.; Shoshi Bhoshun Bose v. Girish Chunder Mitter, 20 C. 940; Khetra Nath Mandal v. Mahomed Alla Rakha, 45 I.C. 921: 23 C.W.N. 48; Secretary of State v. Wazed Ali Khan Pani, 65 I.C. 866: 1921 C. 687; Kali Singh v. Matru Singh, 15 P. 584.

9. See Saraswati Dasi v. Dhanpat Singh, 9 C. 431, per Garth, C.J.; Ram Chunder Sao v. Bunseedhur Naick, 9 C. 741; Akshaya Kumar

Dutt v. Shama Charan Patitanda, 16 C. 586.

10. Tara Kumar Ghose v. Kumar Arun Chandra Singh, 74 I.C. 383: 1923 C. 261.

11. Ramsarup Raut v. Ramnarain Tewary, 7 P. 85: 114 I.C. 479: 1929 P. 32; Sadhu Saran v. Ambika Lal, 68 I.C. 676: 1923 P. 163; Nanda Lal Pathak v. Chanurpat Das, 18 I.C. 143: 17 C.L.J. 462; Bhola Roy v. Jung Bahadoor, 8 I.C. 890; but see Trilok Prasad Singh v. Umanand Lal, 72 I.C. 634: 1922 P. 447; Kali Singh v. Matru Singh, 5 P. 584.

13. But see Khetra Nath Mandal v. Mahomed Alla Rakha, 45 I.C. 921: 23 C.W.N. 48.

14. Chattr Nath Chowdhury v. Babar Ali, 86 I.C. 835: 1925 C. 635; Dinanath Chanda v. Nawab Ali, 49 I.C. 984.

batwara proceedings to rebut the presumption raised by the Record of Rights;¹⁵ but they are no evidence against strangers.¹⁶ Thus, in a suit for enhancement of rent the batwara papers are no evidence against the tenants.¹⁷ The batwara record is evidence under section 35, being an official record; but it is very weak evidence when it conflicts with the Record of Rights.¹⁸ A record of existing rents and other assets of an estate published under section 48 of the Bengal Estates Partition Act is relevant under this section.¹⁹

Maps, surveys and parcha slips.—Maps and surveys in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible as valuable evidence of the state of things at the time they were made.²⁰ Boundaries shown in cadastral surveys are presumed to be correct and are evidence of title, as title follows possession.²¹ A survey entry is presumptive evidence of possession, but this presumption of possession is stronger in the case of culturable land than in the case of land which is unfit for cultivation.²² A cadastral survey map is admissible and presumptive evidence even as against the landlord of the neighbouring estate.²³ If there is any discrepancy between the Gangetic survey map and a later cadastral survey map, the latter must be given preference.²⁴ A parcha slip granted in the course of survey proceedings is not a public document and, not being in any way recognized by law, is inadmissible to prove title or possession. In a criminal trial, however, the Judge is competent to draw the attention of the jury to the fact that the 'parcha' slip was granted to a particular person, as a fact relevant to the question of possession.²⁵

Survey khasra maps which are not finally published have no evidentiary value. Survey officers, under the Calcutta Survey Act, have no power to prepare a record-of-rights, and as such, any note made in a khasra is of no use.²⁶

15. *Sri Ans Das v. Jugat Pat Lall*, 38 I.C. 205.
16. *Rudra Narain Singh v. Rameshwar Singh*, 37 I.C. 829.
17. *Sajiwan Mahto v. Gulab Chand Lal*, 35 I.C. 678; see also *Banamali Paul v. Satis Chandra Dutt*, 56 I.C. 138.
18. *Benoda Charan Chakravarty v. Ramani Kishore Chakravarty*, 60 C. 302: 151 I.C. 749: 1934 C. 488; relied on in *Srijukta Maharaja Sir Bir Bikram Kishore Manikya Bahadur v. Girish Chandra Deb*, P.L.D. 1952 Dacca 214.
19. *Chatterjee Estates, Ltd. v. Dharendra Nath Roy*, (1934) 40 C.W.N. 821.
20. *Radha Kishun v. Shyam Das*, 13 P. 51: 149 I.C. 1095: 1933 P. 671; *Bibi Wakilan v. Deo Nandan Prasad*, 59 I.C. 298: 1921 P. 268; see also *Ko*

- Maung v. Maung Ba Htwe*, 98 I.C. 166: 1926 R. 204; *Kalayi Narayana Jogithaya v. Secretary of State*, 29 I.C. 154.
21. *Radha Kishun v. Shyam Das*, 13 P. 51: 149 I.C. 1095: 1933 P. 671.
22. *Radha Kishun v. Shyam Das*, 13 P. 51: 149 I.C. 1095: 1933 P. 671. For the presumption where there are two inconsistent survey entries, see *Paran Munda v. Santosh Mahto*, 1942 P. 372: 199 I.C. 144.
23. *Radha Kishun v. Shyam Das*, 13 P. 51: 149 I.C. 1095: 1933 P. 671.
24. *Radha Kishun v. Shyam Das*, 13 P. 51: 149 I.C. 1095: 1933 P. 671.
25. *Ram Bhagwan v. E.*, 47 I.C. 82: 19 Cr. L.J. 886.
26. *Murli Prasad Gupta v. Sheo Kishore Narain*, 1950 P. 432: 29 P. 448.

Reports made by public servants.—Every isolated document is not a book, register or record, but in certain cases a single document, e.g., a report by a public servant made within the discharge of his duty, may be considered an official book, register or record.²⁷ Where there is a statutory duty laid upon public officers to investigate and report facts, a report of the facts elicited by their investigation is an official record within the meaning of this section²⁸ and entitled to great weight.²⁹ Thus, a report made by a **Tehsildar** in land acquisition proceedings,³⁰ a crop cutting report drawn up by a Deputy Collector under section 40 of the Bengal Tenancy Act,³¹ a report by a **kanungo** under section 202, Cr. P. Code,³² a report by a **kotwal** to the Political Agent,³³ a report by the Collector under the Court of Wards Act,³⁴ and a peon's return in execution proceedings,³⁵ have been admitted under the provisions of this section. The report of a process-server is not admissible in evidence, unless the process-server has been examined as a witness.³⁶ The report of a Revenue Officer who has conducted a sale is not evidence unless the Revenue Officer has been examined as a witness.³⁷ A report of the administration of a Court of Wards is admissible in proof of the age of a ward of the Court.³⁸ But the report of a confidential inquiry³⁹ or a report by a public servant to his superior regarding a particular fact is not admissible.⁴⁰ Settlement Reports, selections from the records of the Board of Revenue, and District Gazetteers, whether admissible under section 35 or not, may be read for what they may be worth.⁴¹ A document purporting to be the translation of a grant, which is appended as an enclosure to a report by a public servant, is not the right kind of secondary evidence of the terms of the grant.⁴² In a dispute as to whether a certain institution is a Sikh Gurdwara or not, reports of Tehsildars and Extra Assistant Commissioners, prepared in a **muafi** inquiry at a time when there was no such dispute, are relevant and entitled to considerable weight.⁴³

Evidentiary value of Official reports.—Opinions expressed in official reports, though in many cases valuable and the best evidence of the facts stated therein, should not be treated as conclusive in respect of

27. Mallikarajuna Dugget v. Secretary of State, 35 M. 21: 14 I.C. 401.
28. Ramkrishna Pillai v. Jirunarayana Pillai, 55 M. 40: 139 I.C. 684: 1932 M. 198.
29. Marhewson v. Secretary of State, 3 P. 673: 84 I.C. 405: 1924 P. 616.
30. Rathanamassari v. Secretary of State, 72 I.C. 214: 1923 M. 382.
31. Hargobind Singh v. Kishendeyal Gope, 95 I.C. 966: 1926 P. 436.
32. Jagdat v. Sheopal, 104 I.C. 287: 1927 O. 323.
33. Baldeo Das v. Gobind Das, 36 A. 161: 23 I.C. 18.
34. Ramakrishna Pillai v. Tirunarayana Pillai, 55 M. 49: 139 I.C. 684: 1932 M. 198.
35. Rewti v. Mohan Lal, 1940 L. 312; Heramba Nath Bandopadhyaya v. Surendra Nath Mittra, 63 I.C. 20; but see Fateh Muhammad v. Hakim Khan, 8 L. 52: 96 I.C. 825: 1920

- L. 629.
36. Fateh Muhammad v. Hakim Khan, 8 L. 52: 96 I.C. 825: 1926 L. 629.
37. Dataram v. The Punjab National Bank, Ltd., 1936 P.L.R. 515.
38. Ari Chettiar v. Rama Reddiar, 9 I.C. 567.
39. Baldeo Singh v. Sheoraj Kueri, 56 I.C. 807.
40. Nizam Din v. Mohammad Iqbal, 108 I.C. 619: 1928 L. 643; Mallikarajuna Dugget v. Secretary of State, 35 M. 21: 14 I.C. 401; see also Keolapati v. Raja Amar Krishna Narain Singh, 1939 P.C. 249.
41. Jogesh Chandra Roy v. Makbul Ali, 47 C. 979: 60 I.C. 964: 1921 C. 474.
42. Ambalavana Pandarasannadhi v. Kuppachi Janaki Ammal, 35 I.C. 201.
43. Ram Kishan v. Bur Singh, 15 L. 270: 151 I.C. 738: 1934 L. 39.

matters requiring judicial determination.⁴⁴ Reports made by public officers within their province and within their line of duty are not of judicial force or authority; but, being made in the course of duty and under statutable authority, are entitled to much consideration.⁴⁵ The reports of Government officers and official documents containing opinions on the private rights of parties are not to be regarded as having judicial authority. But being reports of public officers made in the course of the duties, they are entitled to great consideration, so far as they supply information of official proceedings and historical facts, and also in so far as they are relevant to explain the conduct and acts of the parties in relation to them and the proceedings of the Government founded on them.⁴⁶

Reports under section 202, Cr. P. Code, or under O. 26, C. P. Code—The words "an entry" in section 35 are not intended to apply to the opinions of public officers contained in reports under section 202, Cr. P. Code, or under O. 26, Civil Procedure Code.⁴⁷

Endorsement of a public document by a public servant; statement made by a public servant in a public document.—An endorsement on an official record signed by a public servant in the performance of his duties should, in the absence of any evidence to throw doubt on it, be presumed to be correct.⁴⁸ A recital in a public record as to a statement made by a public servant with reference to a particular grant by the Government may be admitted under section 35 of the Evidence Act, as proving that the public servant made the statement that he is stated to have made, if the fact that he made such a statement is a relevant fact. But such recital would not be admissible, under section 48, in a case where a specific right claimed by a particular individual, and not a general right, is being dealt with.⁴⁹ A translation of a grant forming an enclosure to the report of a public officer is not the right kind of secondary evidence of the grant.⁵⁰ A statement of the *patwari*, a report of the *Tehsildar* and an order of the Sub-Divisional Officer that the person named in the *khewat* was unheard of, are admissible being acts prescribed by the rules as part of the official duties of the officers concerned.¹

Recitals of relevant facts in judgments inter partes or not inter partes.—Recitals of relevant facts in judgments, not *inter partes*, are not admissible under this section,² but recitals in judgments, *inter partes*,

44. *Martand Rao v. Malhar Rao*, 55 C. 403; 55 I.A. 45; 107 I.C. 7; 1928 P.C. 10; *Raj Rajendra Malojirao Shitole v. The State of Madhya Bharat*, 1953 M.B. 97.

45. *Rajah Muttu Ramalinga Setupati v. Perianayagum Pillai*, 1 I.A. 209; *Chandu Lal v. Pushkar Raj*, 1952 N. 271; 1952 N.L.J. 213; I.L.R. 1952 N. 318.

46. *Muktakeshi Patrani v. Midnapur Zamindary Co., Ltd.*, 13 P. 517; 156 I.C. 136; 1935 P. 33.

47. *Ghanaya v. Mehtab*, 16 L. 377; 155 I.C. 1040; 1934 L. 890.

48. *Kesri Kumar v. Ram Rani*, 53 I.C. 725.

49. *Sankaracharya Swamigal v. Manali Saravana Mudaliar*, 51 I.C. 876.

50. *Ambalavana Pandarasannadhi v. Kuppachi Janaki Ammal*, 35 I.C. 201.

1. *Ram Pheran v. Shri Ram*, 1947 O. 174.

2. *Bhupa v. Jai Chand*, 135 I.C. 202; 1932 L. 50; *Asa Singh v. Mansha Ram*, 121 I.C. 509; 1930 L. 237; *Tripurana Seethapati Rao Dora v. Rokham Venkanna Dora*, 45 M. 332; 66 I.C. 280; 1922 M. 71 (F.B.); see also *Doraisami Naidu v. Kanniappa Chetty*, 131 I.C. 654; 1931 M. 487; 32 Cr. L.J. 767.

are admissible.³ A recital in a judgment that a party made a certain admission,⁴ or filed a pedigree-table in Court is relevant,⁵ and, where the judgment is *inter partes*, it is conclusive against the party and cannot be questioned in appeal.⁶ In a Madras case it has been remarked that a judgment, though *inter partes*, which reproduces an admission made by a party is merely secondary evidence of the admission and is not, therefore, proper proof of the admission, unless a foundation is laid for the reception of secondary evidence.⁷ An entry in an order sheet that notice has been served on a party is admissible and presumptive, though not conclusive, evidence of the *factum* of service.⁸ As to the applicability of section 35 to judgments, see notes to section 13 under the headings "Sections 35 and 11, whether applicable to judgments" and "recitals of age, date of birth or.....section 35."

Entry of date of birth in a guardianship certificate or in a register of applications for guardianship, whether relevant?—An entry of the age or date of birth of a minor, in a certificate of guardianship granted under the provisions of the Guardians and Wards Act, is not admissible under this section;⁹ but in some Oudh cases such entries have been held to be admissible.¹⁰ An entry as to the date of birth of a minor, in a register of applications for guardianship, is inadmissible.¹¹ Recital of the date of birth in the application for appointment of a guardian is not by itself admissible in evidence upon mere production of the document, but may be rendered admissible under certain circumstances. If, however, the conditions recited in section 32(5) Evidence Act, are satisfied, that is, a person who had made the statement had special means of knowledge of the relationship and is now dead or cannot be found, such a statement

3. Gopal Rao v. Sitaram, 97 I.C. 694: 1927 N. 19; Chandu Lal v. Pushkar Raj, 1952 N. 271: 1952 N.L.J. 213: I.L.R. 1952 N. 318.

4. Khedu Mahto v. Khonka Mahto, 1939 P. 591; Collector of Gorakhpur v. Ram Sunder Mal, 56 A. 468: 150 I.C. 545: 1934 P.C. 157; Subbaraya Chettiar v. Sellamuthu Asari, 142 I.C. 548: 1933 M. 184; Rudra Pratap Narain Singh v. Nirman Prasad Singh, 74 I.C. 225: 1923 O. 61; Lakshman Govind v. Amrit Gopal, 24 B. 591; Parbutty Dassi v. Purno Chunder Singh, 9 C. 586; but see Medavarapu Narasayya v. Medavarapu Veerayya, 154 I.C. 753: 1935 M. 268; Tripurana Seethapati Rao Dora v. Rokham Venkanna Dora, 45 M. 332: 66 I.C. 280: 1922 M. 71 (F.B.).

5. Collector of Gorakhpur v. Ram Sunder Mal, 56 A. 468: 1934 P.C. 157.

6. Mirza Shamsheer Bahadur v. Munshi Kunj Behari, 12 C.W.N. 273.

7. Medavarapu Narasayya v. Medavarapu Veerayya, 154 I.C. 753: 1935 M. 268.

8. Lall v. Rajkishore Narain Singh, 13 P. 86: 147 I.C. 201: 1933 P. 658.

9. Muktipada Dawn v. Aklema Khatun, 1950 C. 533; Kishori Lal v. Adhar Chandra, 1942 C. 438; Naima Khatun v. Basant Singh, 149 I.C. 781: 1934 A. 406 (F.B.); Chandrabhan v. Rajkumar, 54 A. 1019: 142 I.C. 794: 1933 A. 100; Saidunnisa v. Rugya, 53 A. 428: 130 I.C. 201: 1931 A. 307; Hara Kumar De v. Jogendra Krishna Ray, 71 I.C. 336: 1924 C. 526; Harihar Prasad Singh v. Edul Singh, 57 I.C. 333: 1921 P. 69; Gunjra Kuar v. Ablakh Pande, 18 A. 478; Satis Chandra Mukhopadhyaya v. Mohendro Lal Pathuk, 17 C. 849; Hem Chandra Chowdhury v. Bhobo Prosad Khan Chowdhury, 2 C.L.J. 69 (n).

10. Mehdi Ali v. Walayat Hussain Khan, 5 Luck. 658: 121 I.C. 277: 1930 O. 97; Amir Husain v. Mohammad Aijaz Husain, 117 I.C. 456: 1929 O. 134; Mohan Lal v. Mohammad Adil, 89 I.C. 69: 1926 O. 88; see also Mohindra Mohan Roy Mukhopadhyaya v. Ram Krishna Sadhukhan, 28 I.C. 595: 31 C.L.J. 621.

11. Kishori Lal v. Adhar Chandra, 1942 C. 438; Gokhulanand v. Baldev Narain Singh, 86 I.C. 681: 1924 P. 796.

will be admissible. The statement made in the application may be used to corroborate a witness or to impeach his credit.¹² A certified copy of an order passed under the Guardianship Act cannot be admissible to prove the age of the minor.^{12a} If it can be shown that the entry as to the date of birth of a minor was made in some document relating to the guardianship proceedings, on the information supplied by a deceased relative of the minor, the entry will be admissible under section 32, as a statement as to pedigree.

Hospital registers and certificates.—Entries in the prescription register of a Government dispensary, made by a compounder, are relevant and admissible under this section though the compounder is not called.¹³ An entry of the parentage of an illegitimate infant made three years after the birth in a vaccination register is admissible under section 35.¹⁴ A certificate as to the age of a private patient does not fall within the terms of section 35.¹⁵ A carbon copy of post mortem notes may be admissible under section 35.¹⁶ An entry as to the age of a person in an inoculation or vaccination register is relevant under section 35.¹⁷

School registers, records and certificates.—School certificates duly prepared according to authority are relevant.¹⁸ A transfer certificate granted by the Head Master of a State school in a native State is a public document, and as such admissible under this section in proof of the age of a scholar.¹⁹ An entry as to the age of a scholar in a Government or Municipal school register is an entry in a public register made by a public servant in the discharge of his duty;²⁰ but in the absence of evidence to show on what materials the entry was made it has not much evidentiary value.²¹ Entries in registers of schools other than Government or State schools are, however, not admissible as employees of such schools are not "public servants."²² In *Abdul Majeed v. Bhargavan*, it was said that the admission registers of Government schools, being admissible under this section, could not be discarded on the ground that the appellant failed to examine the parents or guardians in support of the school records; and that it could not be laid down that under no circumstances entries as to the date of birth in school registers have any value.²³

12. *Mukti Pada Dawn v. Aklema Khatun*, 1950 C. 533.
- 12a. *Muktipada Dawn v. Aklema Khatun*, 1950 C. 533.
13. *D'Cruz v. D'Cruz*, 103 I.C. 512: 1927 O. 310.
14. *Kanniappan v. Kullammal*, 126 I.C. 613: 1930 M. 194: 31 Cr. L.J. 1089.
15. *Venkata Rangappa Naicken v. Subbarayya Goundan*, 33 I.C. 142.
16. *Mohan Singh v. E.*, 85 I.C. 647: 1925 A. 413: 26 Cr. L.J. 551.
17. *Supt. & Remembrancer of Legal Affairs, Bengal v. Forhad*, 153 I.C. 493: 1934 C. 766: 36 Cr. L.J. 364.
18. *Liladhar Bania v. Mabibi*, 149 I.C. 660: 1934 N. 44.
19. *Maharaj Bhanudas Narayanboja Gosavi v. Krishnabai Chintaman Deshpande*, 50 B. 716: 99 I.C. 307: 1927 B. 11.
20. *Kalaram v. Fazal Bari Khan*, 1941

- Pesh*, 38; *Aga Jan Khan v. Kesheo Rao*, 1940 N.L.J. 150; *Latafat Husain v. Onkar Mal*, 152 I.C. 1042: 1935 O. 41; *Supt. & Remembrancer of Legal Affairs, Bengal v. Forhad*, 153 I.C. 493: 1934 C. 766: 36 Cr. L.J. 364; *Las Baba v. Government of Mysore*, 12 Mys. L.J. 133; *Manikchand v. Krishna*, 140 I.C. 66: 1932 N. 117; *Indian Cotton Co., Ltd. v. Raghunath Hari Deshpande*, 130 I.C. 598: 1931 B. 178; *Munna Lal v. Kameshri Dat*, 114 I.C. 801: 1929 O. 113; *Ambika Prasad v. Lal Bahadur*, 83 I.C. 840: 1924 O. 353; *Mahmood Fatima v. Mahmood Khan*, P.L.D. 1954 L. 325.
21. *Janki Nath Roy v. Jyotish Chandra*, 1941 C. 41: I.L.R. (1941) I.C. 234: 193 I.C. 419.
22. *Hook Saing v. Ma Ehta*, 1940 R. 191: 191 I.C. 21.
23. I.L.R. (1962) (2) Ker. 65.

School admission register of a Municipal High School is prepared by a Clerk, who under section 358 of the Dt. Municipalities Act is a public servant. The entry is admissible under this section, which embodies an exception to the rule of hearsay. The clerk need not therefore be examined but his non-examination may be material, if through negligence or other bad motive, the necessary entries had not been made.²⁴

In *Subbarao v. Venkata Ramarao*, it was said that extracts from the register of admissions and withdrawals of municipal schools are extracts from official register, maintained by public servants in the discharge of official duties enjoined by law, and are public documents which can be proved by secondary evidence. They fall within the ambit of this section and cannot be rejected on the ground that the originals were not called.²⁵ An unproved entry in a school register is not sufficient evidence of *alibi*.²⁶ Entries in a conduct book maintained by primary school authorities, entries in application forms for admission to a High School, and monthly progress reports maintained under the rules of the Education Department are relevant as evidence of the conduct of the parties proving or disproving the fact of adoption.²⁷

Matriculation certificate.—Matriculation certificate is held admissible as proof of the age of the candidate.²⁸

In *Anadi Mohan v. Rabindra Nath*, the appellate Court, in arriving at its finding of fact on the question of age, relied upon the statement as to age contained in the matriculation certificate issued by the Calcutta University. It was contended that the certificate was not admissible in evidence. But the contention was rejected on the ground that the certificate was admissible under this section.²⁹

Evidentiary value of school registers.³⁰—The registers are not presumed to have been kept in the performance of duty.³¹

In *Shiv Ram v. Shiv Charan Singh*, it was held, that an entry in a birth and/or death-register as to age is excellent evidence, and may have to be preferred to entries in the records of educational institutions. But the same rule cannot apply in cases where the evidence furnished by the birth registers is not available. It cannot be laid down that entries of age, in school registers, have little or no evidentiary value. Each case must depend upon its own facts and circumstances and must be decided on the net balance or the various counts of proof offered therein.³²

Where there are two documents, one, an entry in the school admission register, and the other, an entry in the staff card, and both of them have been found to be genuine, the entry in the school admission register

24. *Siram Reddi*, In re (1959) 2 Andh. W.R. 241: 1959 M.L.J. Cr. 651.

25. 1963 (2) Andh. W.R. 307.

26. *Chando v. Siri Ram*, 80 I.C. 177: 1923 L. 607.

27. *Chunnibai Madhoram v. Girdhari Lal Chunnilal*, 150 I.C. 1007: 1934 N. 1.

28. *Hrishikesh v. Sushil*, 60 C.W.N.

1053.

29. 65 C.W.N. 1165.

30. *Parmodh Chand v. Narain Singh*, 1936 L. 104: 163 I.C. 81; *Asa Nand v. Gian Chand*, 1936 L. 598: 164 I.C. 751.

31. *Gopalan v. Kannan*, I.L.R. 1958 Ker. 916.

32. I.L.R. 1964 Raj. 26.

cannot be taken to prove birth on the particular date mentioned in the school admission register. It is difficult to say that the entry about the date of birth in one document is correct whereas the entry in the other is not correct.

False entry in School Register can be explained.—However much one may condemn an act of making a false statement of age, in a School Admission Register, with a view to secure an advantage in getting public service, a judge of facts cannot ignore the position that in actual life this happens not infrequently. The explanation that such statement of age was made with a view to secure advantage in public service for which a minimum age for eligibility is often prescribed, may very well be true and it will not be proper for the Court to base any conclusion about the age of a candidate for election on the entries in the School Admission Register; Matriculation Certificate or application for a Government post.³⁴

Municipal registers and records.—Since a Municipality is a public body and its functionaries are public officials, a book or a register maintained by that body is a public book or register within the meanings of section 35.³⁵ A record plan, filed on behalf of a Municipal Committee, in which a site is shown as a public street is not relevant under section 35.³⁶ An entry in a municipal register that a well is public is no evidence against a party laying claim to the well.³⁷ A municipal assessment list, however, is admissible in evidence.³⁸ Entries in municipal registers of births and deaths are relevant and provable by certified copies.³⁹ But where there was nothing to show who wrote the register and on whose information, and who was responsible for keeping it, an entry in a register of births and deaths was held by the Allahabad High Court to be inadmissible.⁴⁰ Entries in the municipal *shajra* and *khasra* are relevant under this section.⁴¹ The *khasra paimaish* of a Municipality is not a record of title but a mere record of survey and, though admissible, carries with it no presumption of correctness so far as the question of ownership is concerned. A Municipality is generally interested more in the assessment of tax than in the determination of ownership and for its purpose an occupier is as good as an owner. Moreover, in the preparation of documents like *khasra paimaish* a Municipality is concerned more with the measurement of the building with a view to safeguard its own interests against any encroachment on the public streets than in the

33. *Tata Iron and Steel Co., Ltd. v. Abdul Wahab*, A.I.R. 1966 Pat. 458.

34. *Brij Mohan Singh v. Narain Sinha*, 1964 S.C.J. (2) 644.

35. *Municipal Board, Aligarh v. Mumtaz Khan*, 1948 A. 309: I.L.R. 1948 A. 215.

36. *Gauri Shankar v. E.*, 120 I.C. 547: 1930 A. 26: 31 Cr. L.J. 133.

37. *Nur Ahmad Khan v. Municipal Committee, Amritsar*, 75 I.C. 896: 1924 L. 511.

38. *Bhagalpur Municipality v. Maulavi Fanik*, 126 I.C. 908: 1930 P. 370.

39. *Mst. Anwari Jan. v. Baldua*, 1936 A. 218: 159 I.C. 190; *Jai Bhagwan*

v. Ghuttoo, 148 I.C. 418: 1934 O. 167; *Anis-ul-Rehman Khan v. Beni Ram*, 59 P.R. 1901; *Maniklal Sha v. Hiralal Shaw*, 1950 C. 377: 54 C. W.N. 225.

40. *Jiwan Bakhsh v. Khan Bahadur Khan*, 19 I.C. 528; see as to this subject notes to this section under the heading "entries in birth and death registers".

41. *Jassa Ram v. Puran Bhagat*, 1938 L. 440: 40 P.L.R. 693; *Jagan Koeri v. Chairman of the Gaya Municipality*, 1937 P. 567: 171 I.C. 732; *Municipal Board Aligarh v. Mumtaz Khan*, 1948 A. 309: I.L.R. 1948 L. 215.

ascertainment of the title of the person owning such buildings.⁴² Extracts from municipal register of *tharas* and of *khanashumari* cannot be relied upon and are inadmissible for the purpose of proving the ownership of a well when there is no statutory obligation on the officials who had prepared these registers to make inquiries as to the ownership of well.⁴³ Entries in a *shajra* prepared by a Municipal Committee are admissible under the present section.⁴⁴

Municipal records—Presumption of correctness.—Presumption relates only to the period when entries were made.⁴⁵

Jail registers.—The jail registers are official records kept by public servants in the discharge of their official duties and when there is no suggestion that the entries are not genuine or that they have been tampered with, or that the officials who made them did not make them on the dates noted therein, they are admissible as a whole.⁴⁶

Forest marking book.—The entries in the marking book made by the forest guard and checked and initialled by the officer responsible for the correctness of the marking are entries in an official record which are admissible in evidence.⁴⁷

First information reports and statements recorded by the police.—A statement recorded by the police under section 161, Cr. P. Code, in the course of investigation of an offence is, under section 162 of the Code, inadmissible in evidence. Section 35 has, however, been applied to a first information report recorded under section 154, Cr. P. Code, by an officer in charge of a police station.⁴⁸ But though a first information report may attract the operation of the provisions of section 35, it cannot be treated as substantive evidence, i.e., as evidence of the facts mentioned therein.⁴⁹ By itself the report would only prove that a certain person made the statement contained in it.⁵⁰ The Oudh Court has held a first information report to be admissible in evidence under section 35, even if the informant be alive and not called as a witness.¹ This view obviously runs counter to the generally accepted view that a first information report is admissible only for the purpose of corroborating or contradicting the testimony of the informant. See notes to sections 145 and 157.

42. Kartar Singh v. Mehr Nishan, 16 L. 313; 155 I.C. 1064; 1934 L. 885; Jassa Ram v. Puran Bhagat, 1938 L. 440; 40 P.L.R. 693.

43. Magan Nath v. Harbans Singh, 1936 L. 965; 163 I.C. 817.

44. Jassa Ram v. Puran Bhagat, 1938 L. 440; 40 P.L.R. 693.

45. Syed Rahiqur v. Commissioner of Wealth-Tax Patna, 1970 Pat. L.J. R. 614.

46. Ram Rao v. E., 1943 O. 1.

47. Barikrao Bhaddoo Kunbi v. E., 1943 N. 139.

48. Babu v. Government of Mysore, 11 Mys. L.J. 475; Muhammad Salim v. Ramkumar Singh, 110 I.C. 657;

1928 A. 710; Chittar Singh v. E., 47 A. 280; 85 I.C. 650; 1925 A. 303; 26 Cr. L.J. 554; Mohan Singh v. E., 85 I.C. 647; 1925 A. 413; 26 Cr. L.J. 551; Gansa Oregon v. E., 2 P. 517; 73 I.C. 561; 1923 P. 550; 24 Cr. L.J. 641, per Mullick, J.

49. Babu v. Government of Mysore, 11 Mys. L.J. 475; Chitar Singh v. E., 47 A. 280; 85 I.C. 650; 1925 A. 303; 26 Cr. L.J. 554; Gansa Oregon v. E., 2 P. 517; 73 I.C. 561; 1923 P. 550; 24 Cr. L.J. 641.

50. Mohan Singh v. E., 85 I.C. 647; 1925 A. 413; 26 Cr. L.J. 551.

1. Abheraj Singh v. Gaya Singh, 135 I.C. 387; 1932 O. 137.

Relevancy of Police Report of election meeting.—The first part of section 35, says that an entry in any public record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty is relevant evidence. Quite clearly the report of a Police Officer deputed to cover election meetings is made by a public servant in the discharge of his official duties. Hence when the issue before the Court hearing an election petition under the Representation of the People Act is whether the returned candidate had arranged certain election meetings on certain dates for the purpose of finding out whether he had incurred expenditure more than the prescribed limit, the police reports regarding the meetings are extremely relevant. They come within the ambit of the first part of section 35.²

Proof of Electoral Roll—The electoral roll prepared under the Representation of the People Act is admissible in evidence without the author thereof and the person supplying the information being examined in the case. When the electoral roll is produced before the Court by virtue of section 81 read with section 4 of the Evidence Act, the Court shall regard the fact entered in the electoral roll as proved unless and until it is disproved.³

Evidentiary value of voter's list.—There is no evidence to show that at whose instance the father's name of the voter was mentioned. The person preparing the voters' list is not examined. Hence no reliance can be placed on the voters' list affecting the proof of relationship claimed in the voters list.⁴

Entries in Crime Note Book.—Where there is an official duty cast upon any officer to make an entry in his register, such entries are admissible under section 35. The village Crime Note Book is one of the registers which are prescribed for a station house under the Police Manual. Therefore, entries in it are admissible to prove that certain crimes were reported and registered, but of course they are no proof against persons named as suspects in them.⁵

Entries in the book prescribed under section 154 Cr. P. C. may be relevant under this section. But a report made to a Magistrate, as provided under section 157 Cr. P.C., is not relevant under this section, being a report, though it may be a public document.⁶

War Diaries.—Under section 35 of the Act, the documents admissible are not only public documents, but also records of official acts. The War Diaries were records of official acts and in fact, there was specific evidence of witnesses that these were required to be maintained under the rules applicable to the units of the army which maintained these

2. J. C. Purushothama Reddiar v. S. Perumal, (1972) 1 S.C.J. 469.

3. Kirtan Sahu v. Thakur Sahu, 1972 (1) C.W.R. 57: 38 Cut. L.T. 82.

4. Paramananda Sahu v. Babu Sahu, (1970) 36 C.L.T. 1211.

5. Amdumiyar Gulzar v. E., I.L.R. 1937 N. 315: 1937 N. 17: 166 I.C. 582 & 587: 38 Cr. L.J. 237 & 251.

6. Hasan Abdulla v. State of Gujarat, 1962 Guj. L.R. 107.

diaries. The diaries were further proved by the evidence of the persons who wrote them and of the persons who dictated the entries recorded in them. There was, therefore, no error in admitting these diaries in evidence.⁷

Recovery list.—A recovery list prepared by the police under section 103, Cr. P. Code, is an official document properly admissible under section 35 of the Evidence Act. But if it contains any inadmissible confession, the part containing such inadmissible matter must be excluded.⁸

Public record of a relevant statement is admissible.—The statement of a Court that a person admitted the claim of another person in a case pending before it is relevant, inasmuch as the statement forms part of the record.⁹ A recital in a public record as to a statement made by a public servant with reference to a particular grant by the Government may be admitted, under section 35 of the Evidence Act, as proving that the public servant made the statement that he is stated to have made, if the fact that he made such a statement is a relevant fact.¹⁰ When original notification or order issued by the Government is not traceable and has been lost the statement in the Orders and Rules published under the authority of the Government, being a record made by a public servant in the discharge of his official duty, can be admitted in evidence and relied upon.¹¹

District Gazetteers.—A District Gazetteer, even if not admissible under section 35, may be read for what it is worth;¹² but it is no substitute for a family pedigree.¹³ The Bengal District Gazetteer may be referred to to see if the duties of *simanadars* are the same as the duties of *chaukidars*.¹⁴

Meteorological records.—Records kept by the weather bureau or signal service, or by public officers who are required to keep such records as part of their official duty, are admissible in evidence as to the condition of the weather at a certain time and place, as they come within the rule which admits in evidence official registers or records kept by persons in public offices, in which they are required, either by statute or the nature of their office, to write down particular transactions occurring in the course of their public duties or under their personal supervision.¹⁵

Correspondence and copies of correspondence.—Copies of actual letters made in registers of official correspondence kept for reference and

7. *Bakhshish Singh v. State of Punjab*, 1967 All Cr. R. 79.

8. *Baloch Pirwali v. E.*, 144 I.C. 772; 1933 S. 220; 34 Cr. L.J. 848; *Mahfuz Ali v. State*, 1953 A. 110; 1953 Cr. L.J. 340; 1953 A.L.J. 193.

9. *Subbaraya Chettiar v. Sellamuthu Asari*, 142 I.C. 548; 1933 M. 184; *Rudra Pratap Narain Singh v. Nirman Prasad Singh*, 74 I.C. 225; 1923 O. 61; but see *Tripurana Seethapati Rao Dora v. Rokham Venkanna Dora*, 45 M. 332; 66 I.C. 280; 1922 M. 71 (F.B.).

10. *Sankaracharya Swamigal v. Manali Saravana Mudaliar*, 51 I.C. 876.

11. *Amir Khan v. State*, 1950 A. 423; 51 Cr. L.J. 1144; 1950 A.L.J. 407.

12. *Jogesh Chandra Roy v. Makbul Ali*, 47 C. 979; 60 I.C. 984; 1921 C. 474; *Kali Prosanna v. Nagendra Nath*, 44 C.W.N. 873.

13. *Balmakund v. Bishwa Nath Singh*, 52 I.C. 851.

14. *Lalu Dome v. Bejoy Chand Mahatap*, 43 C. 227; 33 I.C. 563.

15. 10 R.C.L. 1129.

record are admissible in evidence under section 35 and are entitled to great consideration.¹⁶ The section is, however, not applicable to ordinary correspondence conducted by officials, as the entry must be in something which is a book, register or record.¹⁷ A letter of the Government of India, in which anaesthesine is included in the list of recognised preparations of cocaine, is not admissible in evidence.¹⁸ Documents consisting of mere opinions expressed in secretariat correspondence which passed between various officers of the Government who had held no personal inquiries in the matter are inadmissible in evidence.¹⁹

Instances of other entries held admissible under the section.—

An entry made by a Muhammadan Registrar of Marriages, under Act I of 1876, that the wife might under certain circumstances divorce her husband is admissible.²⁰ An entry in a register of previous convictions is admissible evidence of a previous conviction.²¹ An entry in a register of civil suits that a suit was disposed of in a particular manner is admissible.²² An entry made in a certified copy as to the date on which the copy was applied for and the date on which it was completed is relevant, but not a departmental report by the copyist to his superior.²³ Copies of letters made in registers of official correspondence kept for the purpose are admissible.²⁴ **Katardhar** papers drawn up under the Punjab Land Preservation Act are public documents, certified copies of which are admissible.²⁵ Entries in a register made, under Bengal Act VII of 1876, by the Collector, are entries made in an official register kept by a public servant under the provisions of a statute, and certified copies of such entries are admissible in evidence for what they are worth.²⁶ A statement of a **kanungo** recorded by a Settlement Officer in the discharge of his official duty is admissible in evidence under section 35 of the Evidence Act.²⁷ Entries in village Crime Note Book are admissible under this sec-

16. *Navaneetha Krishna Thevar v. Ramasami Pandia Thalavar*, 40 M. 871; 39 I.C. 263; see also *Sevugan Chettiar v. Zamindar of Sivganga*, 1939 M.W.N. 841; 1940 M. 273; *Public Prosecutor v. G. Sadagopan*, 1953 M. 785; 1953 Cr. L.J. 1429; 1953, 1 M.L.J. 636; 1953 M.W.N. 291, but see *Biswabhusan Naik v. State*, 1952 Orissa 289; 1952 Cr. L. J. 1533.
17. *Matusri Jijoyamba Bai v. Vengalakshmi Ammal*, 5 I.C. 827; 5 P. R. 1910 Cr.; *Ghulam Mohammad Khan v. Samundar Khan*, 1936 L. 37; 165 I.C. 626; *Keolapati v. Raja Amar Krishna Narain Singh*, 1939 P.C. 249.
18. *Bishan Dass v. E.*, 42 I.C. 166; 18 Cr. L.J. 964.
19. *Ghulam Mohammad Khan v. Samundar Khan*, 1936 L. 37; 165 I.C. 626.
20. *Khadem Ali v. Tajimunnissa*, 10 C. 607.
21. *Maung Tha Zan v. E.*, 42 I.C. 923; 19 Cr. L.J. 11.
22. So assumed in *Sarat Chandra Das v. Sarajini Rudraja*, 79 I.C. 257; 1924 C. 135; see also *Basanta Kumari Dasi v. Janamendra Nath Ghose*, 1940 C. 589; *Gokulanand v. Baldev Narain Singh*, 86 I.C. 681; 1924 P. 796; *Hiralal Ranchhod-das v. Secretary of State*, 134 I.C. 721; 1931 B. 436.
23. *Nizam Din v. Mohammad Iqbal*, 108 I.C. 619; 1928 L. 643.
24. *Navaneetha Krishna Thevar v. Ramasami Pandia Thalavar*, 40 M. 871; 39 I.C. 263; *Public Prosecutor v. G. Sadagopan*, 1953 M. 785; 1953, 1 M.L.J. 636.
25. *Shamasuddin v. Ganesh Gir*, 117 I.C. 80; 1929 L. 328.
26. *Shashi Bhooshun Bose v. Girish Chunder Mitter*, 20 C. 940; *Shyama Sundari Dasya v. Mahomed Zarip*, 3 I.C. 693; 9 C.L.J. 91; but see *Saraswati Dasi v. Dhanpat Singh*, 9 C. 431.
27. *Lal Harihar Pratap Bakhsh Singh v. Bisheshwar Bakhsh Singh*, 3 Luck. 326; 109 I.C. 422; 1928 O. 307.

tion though they are no proof against persons named as suspects in them.²⁸ An entry in the register of powers-of-attorney maintained by the Registering Officer under the Registration Act is relevant under section 35 to prove the contents of the power-of-attorney and may be presumed to be correct in accordance with the usual presumption that official acts have been regularly performed.²⁹ An endorsement by the Sub-Registrar showing that the executant presented the document for registration and acknowledged its execution is relevant under this section.³⁰ Entries in public records consequent upon a decree are relevant under this section.³¹ An entry in an order sheet as to the service of a notice is admissible.³² The irrigation map and the *khasras* prepared by the canal department are admissible in proof of possession.³³ A pedigree contained in an estate note-book prepared under the Court of Wards Manual is an official document prepared by public authority in pursuance of statutory authority and is evidence of the facts stated therein even if it does not show the source, on which its compiler based his findings.³⁴ Entries of vaccination in the Vaccination Report are relevant and their certified copies are admissible.³⁵

Mutation entries.—There is no presumption of correctness attached to a mutation as to the date of the death of the last holder.³⁶

Evidentiary value of mutation order based on untrue evidence.—The decision of the Naib Tahsildar in a mutation proceeding even as a piece of evidence has little evidentiary value when it is founded on a material piece of evidence which is untrue. The decision in appeal of the Deputy Commissioner suffers from the infirmity.³⁷

Report of Court of Enquiry on accident to aircraft.—The report of a Court of Enquiry on accident to aircraft by crash while navigating, is an official report of a formal investigation by a Court under Rule 75 of the Aircraft Rules. The investigation is to be conducted by an authority who is designated in the statute and/or rule as a Court. Though designated as a Court, the Court of Enquiry is not a civil Court which can deliver judgments and pass a decree. Such a report is not admissible as a judgment under sections 40, 41 and 42 of the Act, but is admissible under this section. The report is, however, entitled to adequate weight and its findings, as to matters of fact, cannot be rejected or set aside unless sufficient acceptable evidence is tendered before the Court hearing the suit to indicate the contrary findings.³⁸

The report of the Court of Enquiry cannot be regarded as an entry in a public or official book, register or record within the meaning of this

28. *Amdumiyar Guljar Patel v. Opposite Party*, 1937 N. 17.

29. *Pattu Kumari v. Nirmal Kumar*, 43 C.W.N. 907: 1939 C. 569: 185 I. C. 691.

30. *Ganpatrao v. Nagorao*, 1910 N. 382: 193 I.C. 41; *Fateh Mohammad v. Ghosia Bibi*, 1953 Ajmer 19.

31. *Kesho Prasad Singh v. Bahuria*, 16 P. 258: 1937 P.C. 69: 167 I.C. 329.

32. *Gaibandha Loan Office, Ltd. v. Saiyadunnessa Khatun*, 1943 C. 114: I.L.R. (1943) I.C. 22: 76 C.L.J. 17; *Aswini Kumar Das Gupta v.*

Karamat Ali Khan, 1948 C. 165: 82 C.L.J. 278.

33. *Raja Mohan Bikram Shah v. Deonarain Mahto*, 1945 P. 458.

34. *Kuar Sham Pratap Singh v. Collector of Etawah*, 1946 P.C. 103.

35. *Manikra Jairamji v. Deorao Baliram*, 1955 N. 290.

36. *Dalpat Singh v. Rajwant Singh*, 1954 Punj. 33.

37. *Dayaram v. Dawalatshah*, 1971 S. C.J. (2) 431.

38. *Madhuri v. I.A. Corporation*, A.I. R. 1962 C. 544.

section. Yet this enquiry is a formal and statutory enquiry under section 7 of the Aircraft Act, 1934, read with the rule 75 of the Aircraft Rules. It is not a private enquiry. The report is a relevant fact under section 5 of the Act, because it bears on the question of the existence or non-existence of every fact in issue and of such other facts which are regarded as relevant under this Act. This report is also a fact which speaks of the occasion, cause or effect or facts in issue under section 7 of the Act. The report is also admissible as a fact under section 9 of the Act, because it is a fact necessary to explain or introduce a fact in issue or relevant fact, or which supports or rebuts an inference suggested by a fact in issue or relevant fact, or fixes the time and place at which any fact in issue or relevant fact happened. For these reasons the report of the Court of Enquiry on the accident is a relevant fact and as such is admissible. The report is a printed report and published by the Government under Rule 75 of the Indian Aircraft Rules. The report bears all the authentic marks of official recognition. Therefore, under section 81 of the Act the Court is bound to presume the genuineness of this report. Therefore, the report is both relevant and admissible, but the evidence tendered before the Court of Enquiry is not necessarily evidence.³⁹

Entries held inadmissible under the section.—Entries in *teiskhana* registers are not relevant under this section, as the *patwari* who makes them is not a public servant.⁴⁰ Neither a register of *chaukidari chakran* lands,⁴¹ nor a return filed by a *zamindar* in the Collector's office under section 48 of Bengal Regulation VIII of 1793 and section 15(8) of Bengal Regulation VII of 1793,⁴² is admissible under this section. *Rasabandi* or *chaukidara* papers are not prepared by a public servant in the discharge of his official duty and are, therefore, inadmissible under section 35.⁴³ A *hissawari* prepared in consequence of a demand made by the Collector under section 30 of the Bengal Land Regulation Act is not a public or other official book, register or record, and is inadmissible under section 35. It is merely the record of information supplied by some of the sharers in an estate and can only be admitted in evidence if it is proved to have been made by the person or persons by whom it is signed.⁴⁴ Absence of entry of a tenure in a writ of attachment prepared by the Collector who had no duty cast upon him to prepare a record of all the tenures in existence is not relevant.⁴⁵ Certified copies of *fard hissa kashi baghat* of the first regular settlement are admissible.⁴⁶ Section 35 is inapplicable to depositions made by witnesses in an inquiry by a Revenue Officer to ascertain the heirs of a deceased proprietor.⁴⁷ In the absence of all evidence to show how and by whom a register of houses was prepared, it cannot be treated as a public document, even though it is maintained in the re-

39. *Indian Airlines Corporation v. Madhuri*, A.I.R. 1965 C. 252.

40. *Samar Dusadh v. Juggul Kishore Singh*, 23 C. 366; *Baij Nath Singh v. Sukhu Mahton*, 18 C. 534.

41. *Sheonandan Singh v. Jeonandan Dusadh*, 1 I.C. 376: 13 C.W.N. 71.

42. *Tarak Chandra Chakravarty v. Prosanna Kumar Saha*, 78 I.C. 719: 1924 C. 654.

43. *Thakar Singh v. Ghanaya Singh*,

94 I.C. 125: 1926 L. 452.

44. *Thana Singh v. Bandhu Singh*, 59 I.C. 8.

45. *Tara Kumar Ghose v. Kumar Arun Chandra Singh*, 74 I.C. 383: 1923 C. 261.

46. *Lachhman v. Satrohan Singh*, 38 I. C. 67.

47. *Bayava Siddappa Desai v. Parvala Basavanappa Bellad*, 144 I.C. 442: 1933 B. 126.

cord room of the Collector of the district.⁴⁸ A certificate by the Manchester Chamber of Commerce certifying the existence of a coal strike,⁴⁹ or a certificate by a doctor as to the age of a private patient,⁵⁰ does not fall within the terms of this section. Secretariate notes do not come within the scope of section 35 of the Act. A note recorded on a file that sanction for prosecution has been accorded is not admissible.¹

The entry in the *roznama* cannot be said to be a judicial order, as the *roznama* merely records as to what happened on the day on which the suit was fixed for hearing.²

Municipal Act.—Under section 136 of the Calcutta Municipal Act the authority is limited to inspection, survey and measurement and does not authorise the making of any entry. If the making of such an entry is neither authorised nor required by statute, it cannot be said that the officer made the entries in discharge of his official duty.³

Recitals of boundaries of land in a sale certificate.—Recitals of boundaries in a sale certificate relating to adjoining lands cannot be admitted in evidence to prove the facts recited therein as to the lands lying on the boundaries, as a sale certificate is not a public or other official book, register or record.⁴ See also notes to sections 32(3) and 13.

Sections 35 and 77.—A certified copy of an extract from the register of births maintained by the Municipal Committee under by-laws framed under section 183(c) of the Punjab Municipal Act must be regarded as the record of official acts performed by public servants in the discharge of their official duties and is admissible under section 35 of the Evidence Act without proof under section 77 of the Evidence Act.⁵

Facts contained in Judgment not Inter partes are not admissible under sections 40 to 43.—The Act does not make a finding of fact arrived at on the evidence before the Court in one case evidence of that fact in another case. A judgment not *inter partes*, which is not admissible under sections 40 to 43 of the Act, does not become relevant, merely because it contains a statement as to a fact which is in issue or relevant in the suit and to such a judgment this section has no application. Where a judgment is neither in rem, nor relates to matters of a public nature, nor is one between the parties to a subsequent suit, the fact that the Court by that judgment decides a point in a particular way is not relevant for the purpose of the decision of the same point in the subsequent suit. There-

48. Mahtab Din v. Kasar Singh, 107 I.C. 618: 1928 L. 640.

49. Girdhardas Coorji v. Kerawala Karsandas & Co., 93 I.C. 622: 1926 B. 258.

50. Venkata Rangappa Naicken v. Subbaraya Goundan, 33 I.C. 142.

1. Biswabhusan Naik v. State, 1952 Orissa 289: 1952 Cr. L.J. 1533 but see Public Prosecutor v. G. Sadagopan, 1953 M. 785: 1953 Cr. L.J.

1429.

2. Krishnaji Ramchandra v. Raghunath Shankar, 1954 B. 125.

3. Jitendra Nath v. Makhan. (1957) 61 C.W.N. 175.

4. Ambika Charan Kundu v. Kumud Mohan Chaudhury, 110 I.C. 521: 1928 C. 393.

5. Sham Lal v. Muni Lal, (1972) 74 P.L.R. 67.

fore, the statement of a relevant fact in a previous judgment, not *inter partes*, is not admissible under section 35.⁶

Commissioner's Report.—Report of a Commissioner dying after filing his report is admissible in evidence under the provision of section 35.⁷

36. Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of ⁸[the Central Government or any State Government]⁸ as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts.

Relevancy of state-
ment in maps, charts
and plans.

COMMENTARY

Maps, charts and plans.—Section 35 deals with public records, and section 36 with particular classes of public documents, namely, maps, charts and plans.⁹

Published maps or charts generally offered for public sale.—This section deals with two kinds of maps, (i) maps or charts generally offered for public sale, and (ii) maps or plans made under the authority of Government. The admissibility of the first kind depends on grounds similar to those on which a Judge may refer to a dictionary for the meaning of a word or to a historical work for information on matters of public history.¹⁰ The publication being accessible to the whole community and open to the criticism of all, the probabilities are in favour of any inaccuracy being challenged and exposed.¹¹ Where the sale of copies of maps printed by Government is stopped and a copy is sold to a party by mistake, the copy is inadmissible in evidence.¹² Published maps generally offered for public sale are admissible to show the relative positions of towns, countries and other matters of geographical notoriety. In *R. v. Orton*,¹³ maps of Australia were received to show the situation of various places at which the defendant was alleged to have lived; in *R. v. Jameson*,¹⁴ standard maps of Rhodesia and the Transvaal were admitted to show the general position of the places referred to; in *Edmondson v. Amery*,¹⁵ War Office maps were admitted to show the position of various

6. *Khedra v. Turia*, 1962 B.L.J.R. 323.

7. *Luxmi Narayan v. State Bank of India*, A.I.R. 1969 Pat. 385.

8. The word "Government" originally used in the section was substituted by the words "any Government in British India" by the Government of India (Adaptation of Indian Laws) Order, 1937. These words were substituted by the words "the Central Government of any Provincial Government", by the Indian Independence (Adaptation of Central Acts and Ordinances) Order,

1948. The word "State" was substituted for the word "Provincial" by the Adaptation of Laws Order, 1950.

9. *Tarini Charan Sarkar v. Fakarrannissa Chaudhurani*, 15 I.C. 459.

10. See Section 57.

11. *Field, Ev.*, 8th Ed., 240.

12. *Gadadhar v. Sarat Chandra*, 1941 C. 193: 195 I.C. 412: 44 C.W.N. 935: 72 C.L.J. 320.

13. See *Steph. Dig.*, Art 35.

14. *Trial at Bar*, 1896 Q.B. July 21, Official Rep. 91—5.

15. *Times* Jan. 28, 31, 1911.

places in South Africa;¹⁶ and in **Prahlad Sen v. Rajendra Kishore Singh**,¹⁷ the Privy Council referred to a "good general map of India".

Maps and plans made under the authority of Government must have been made for a public purpose.—Maps and plans made under the authority of Government are relevant and are, under section 83, presumed to be correct,¹⁸ provided they were made for a public¹⁹ and not for a private purpose.²⁰ A map made by Government for a particular purpose which is not a public purpose, e.g., for the settlement of the silted bed of a river, is not admissible under this section; nor is there any presumption or to the accuracy of such a map under section 83 of the Act.²¹

Map not an official map—Admissible only on proof that it was generally offered for public sale.—The question about the admissibility of the map has to be considered in the light of section 36. The map in question is not one made under the authority of the Central Government or any State Government; and so, before, it is treated as relevant, it must be shown that it was generally offered for public sale. Without proof of the fact that the maps of the kind were generally offered for public sale, the map in question would be irrelevant.²²

Superimposed maps.—Superimposed maps and plans may be relied on if they are brought to the same scale.²³

Plan made by a Commissioner.—A plan prepared by a Commissioner in a suit, even if not an integral part of the trial and appellate judgments, is nevertheless admissible to render those judgments intelligible.²⁴

Proof of maps and plans.—The Court shall presume that maps or plans purporting to be made by the authority of Government were so made and are accurate; but maps or plans made for the purpose of any cause must be proved to be accurate.²⁵

Survey maps.—Maps and surveys in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons concerned as to be admissible in evidence and to be valuable evidence of the state of things at the time they were made.²⁶ The survey officer is required to seek the cooperation of the

16. Phipson, Ev., 7th Ed., 367.

17. 2 B.L.R. 111 (P.C.).

18. Ram Chandar v. Ali Muhammad, 35 A. 197: 18 I.C. 797.

19. Tarini Charan Sarkar v. Fakaranissa Chowdhurani, 15 I.C. 459; Kanto Prasad Hazari v. Jagat Chandra Dutta, 23 C. 335.

20. Rahmatullah Khan v. Secretary of State, 63 P.R. 1918: 18 I.C. 792: 113 P.L.R. 1918.

21. Kanto Prasad Hazari v. Jagat Chandra Dutta, 23 C. 335.

22. Ram Kishore Sen v. Union of India, A.I.R. 1966 S.C. 644.

23. State of Andhra Pradesh v. P. V. Raju, 1959 Andhra L.T. 305.

24. Joseph v. Makkaru, I.L.R. 1960 Ker. 7.

25. Section 83; Kesho Prasad Singh v. Bahuria, 16 P. 258: 1937 P.C. 69: 167 I.C. 329.

26. Sitanath Saha v. Manoranjan Roy, 1939 C. 148; Debendra Nath Bagchi v. Surendra Nath Sur. 102 I.C. 370: 1927 C. 345; Mazharul Ekbal v. Gopal Lal Ray Bahadur, 84 I.C. 488: 1924 P. 719; Kali Prosanna Bhaduri v. Rani Hemanta Kumari Debi, 79 I.C. 1038: 1924 C. 977; Bibi Wakilan v. Deo Nandan Prasad, 59 I.C. 298: 1921 P. 268; Secretary of State v. Radha Kishore Manikya Bahadur, 44 C. 328: 43

parties interested in the measurement and, therefore, it is reasonable to presume that the parties were present at, and had notice of, the survey proceedings,²⁷ and if there is an entry in the map that it was prepared in the presence of the parties or their representatives, the entry is admissible²⁸ and evidence of the fact that it was so prepared. A cadastral survey map is properly judicially receivable in evidence,²⁹ and is presumed to be correct unless shown to the contrary.³⁰ There is no provision of law which makes a survey map inadmissible in evidence without the field-book. The failure to produce the field-book affects the weight to be attached to the map and not its admissibility.³¹ A map prepared by a Municipality under the Calcutta Survey Act is prepared under the authority of Government and a presumption of correctness attaches to it under section 83.³²

Survey maps are good but not conclusive evidence of possession; presumption as to their accuracy.—Primarily a survey map is evidence of possession³³ at the time at which the survey was made.³⁴ The map is not, however, conclusive and may be shown to be wrong, but in the absence of evidence to the contrary, it may be properly and judicially received in evidence as correct.³⁵ There is a *prima facie* presumption in favour of the accuracy of survey maps and it is for the party who impugns their accuracy to prove his case.³⁶ The map may be shown to be

- I.A. 303: 38 I.C. 379: 1916 P.C. 141; Vadakhiniyedath Kirnagat Sankaran Nambudripad v. Nilombur Thacharakanil Manavikraman, 10 I.C. 653; Jagendra Nath Roy v. Secretary of State for India, 30 C. 291: 30 I.A. 44 (P.C.).
27. Nazirul Haq v. Abdul Wahab Khan, 1 P. 65: 64 I.C. 326: 1922 P. 58; see also Ramanandan Sahay v. Jaogovind Pandey, 2 P. 839: 75 I.C. 955: 1924 P. 213; Nobo Coomar Dass v. Gobind Chunder Roy, 9 C.L.R. 305.
28. Bidhumukhi Dasi v. Jitendra Nath Roy, I.C. 442: 10 C.L.J. 527.
29. Mazharul Ekbal v. Gopal Lal Rai Bahadur, 84 I.C. 488: 1924 P. 719; Muhammad Guran Choukidar v. Basarat Ali, 55 I.C. 645.
30. Mohamad Guran Choukidar v. Basarat Ali, 55 I.C. 645; see also Brindraban Prasad v. Gopal Saran Narain Singh, 104 I.C. 514: 1928 P. 36.
31. Shashi Bhusan Banerji v. Ramjas Agarwala, 3 P. 85: 83 I.C. 205: 1924 P. 402.
32. Jagan Koeri v. Chairman of the Gaya Municipality, 1937 P. 567: 171 I.C. 732.
33. Debendra Nath Bagchi v. Surendra Nath Sur, 102 I.C. 370: 1927 C. 345; Ramanandan Sahay v. Jaogovind Pandey, 2 P. 839: 75 I.C. 955: 1924 P. 213; Nazirul Haq v. Abdul Wahab Khan, 1 P. 65: 64 I.C. 326: 1922 P. 58; Syam Lal Sahu v. Luchman Chowdhury, 15 C. 353; Joytara Dassee v. Mahomed Mo-baruck, 8 C. 975; Mohesh Chander Sen v. Juggut Chunder Sen, 5 C. 212.
34. Bibi Wakilan v. Deo Nandan Prosad, 59 I.C. 298: 1921 P. 268; Syam Lal Sahu v. Lachman Chowdhury, 15 C. 353.
35. Kali Prosanna Bhaduri v. Rani Hementa Kumari Debi, 79 I.C. 1038: 1924 C. 977; Ramanandan Sahay v. Jaogovind Pandey, 2 P. 839: 75 I.C. 955: 1924 P. 213; Tara-moni Chaudhurani v. Gopal Das Chaudhury, 65 I.C. 182; Bibi Wakilan v. Deo Nandan Prosad, 59 I.C. 298: 1921 P. 268; Maung Thin v. Ma Zi Zan, 44 I.C. 247; Secretary of State v. Radha Kishore Manikya Bahadur, 44 C. 328: 43 I.A. 303: 38 I.C. 379: 1916 P.C. 141; Mirza Shamsheer Bahadur v. Munshi Kunj Behari, 12 C.W.N. 273; Jagadindra Nath Roy v. Secretary of State for India, 30 C. 291: 30 I.A. 44 (P.C.); see also Mazharul Ekbal v. Gopal Lal Ray Bahadur, 84 I.C. 488: 1924 P. 719; Kumar Kamakhya Narain Singh v. Abhiman Singh, 13 P. 589: 150 I.C. 807: 1934 P.C. 182.
36. See Tarakdas Acharjee Choudhury v. Secretary of State, 1935 P.C. 125: 156 I.C. 548; Muhammad Habibuddin v. Muhammad Waezul Haq, 1933 P. 555 (2); Baijnath Jugalkishore v. Manindra Chandra Nandi, 133 I.C. 453: 1931 P. 436.

incorrect by the admissions of the parties, or adjudication by a Court, or by evidence, intrinsic or extrinsic to the map in question.³⁷ The fact of a later survey map having been prepared does not affect the presumption of accuracy of an earlier superseded map.³⁸ But unless it can be proved that the person against whom a survey map is attempted to be used expressly consented to the delineation or admitted the correctness of the map, he is not bound by it.³⁹ If, however, the parties consent to be bound to regard the boundary lines as laid by the survey authorities as conclusive, they cannot afterwards question the correctness of the same.⁴⁰

Factors governing the evidentiary value of survey maps.—The weight to be attached to survey maps is in direct ratio to the opportunities which existed of objecting to the demarcation made by the survey officer. If objections were made and disallowed, the map would be the best evidence in cases of boundary disputes. If objection was made to one part of a boundary line and not to another, acquiescence in the latter must be presumed, and it would also afford cogent evidence of an admission of the correctness of the boundary or of the statement as to that part.⁴¹

Survey maps, whether evidence of title?—A survey map is not direct evidence of title in the same way as a decree in a disputed cause is evidence of title,⁴² for the survey officers have no jurisdiction to inquire into or decide questions of title.⁴³ A survey map merely demarcates the boundaries of the various estates and ascertains the areas comprised therein,⁴⁴ and even if it shows a person to be the proprietor of an estate, it exceeds its scope and is not thereby rendered direct evidence of title.⁴⁵ But a survey map is undoubtedly good evidence of possession, and evidence of possession is evidence of title.⁴⁶ A survey map is cogent evidence and may alone be the foundation of a decree declaring title, if the evidence afforded by it is not rebutted.⁴⁷ In each case it must be decided upon the circumstances whether the map raises a reasonable

37. *Taramoni Chaudhurani v. Gopal Das Chaudhury*, 65 I.C. 182.

38. *Joggesur Singh v. Bycunt Nath Dutt*, 5 C. 822.

39. *Kristo Moni Gupta v. The Secretary of State for India*, 3 C.W.N. 99.

40. *Raghunath Prasad Singh v. Rameshwar Singh*, 1922 P. 87.

41. *Dunne v. Dharani Kanta Lahiri*, 35 C. 621.

42. *Debendra Nath Bagchi v. Surendra Nath Sur*, 102 I.C. 370: 1927 C. 345; *Nobo Coomar Dass v. Gobind Chunder Roy*, 9 C.L.R. 305; see also *Aung Hla v. Ton Gyi*, 35 I.C. 432.

43. *Nazirul Haq v. Abdul Wahab Khan*, 1 P. 65: 64 I.C. 326: 1922 P. 58; *Nobo Coomar Dass v. Gobind Chunder Roy*, 9 C.L.R. 305.

44. *Ramanandan Sahay v. Jaogovind Pandey*, 2 P. 839: 75 I.C. 955: 1924

P. 213; see also *Nazirul Haq v. Abdul Wahab Khan*, 1 P. 65: 64 I.C. 326: 1922 P. 58.

45. *Ramanandan Sahay v. Jaogovind Pandey*, 2 P. 839: 75 I.C. 955: 1924 P. 213.

46. *Radha Kishun v. Shyam Das*, 13 P. 51: 149 I.C. 1095: 1933 P. 671; *Brindraban Prasad v. Gopal Saran Narayan Singh*, 104 I.C. 514: 1928 P. 36; *Debendra Nath Bagchi v. Surendra Nath Sur*, 102 I.C. 370: 1927 C. 345; *Nazirul Haq v. Abdul Wahab Khan*, 1 P. 65: 64 I.C. 326: 1922 P. 58; *Satcowri Ghosh Mondal v. Secretary of State*, 22 C. 252; *Syam Lal Sahu v. Lachman Chowdhury*, 15 C. 353; see also *Syama Sunderi Cassya v. Jogubundhu Sootar*, 16 C. 186.

47. *Dunne v. Dharani Kanta Lahiri*, 35 C. 621.

presumption of title.⁴⁸ In general, where the question is simply one of title, and the available evidence is proof of possession at a particular period, a survey map ought to be and is most cogent evidence.⁴⁹ The presumption of possession raised by a survey map is stronger in the case of culturable land than in the case of land which is unfit for cultivation.⁵⁰ A cadastral survey map is admissible and presumptive evidence even as against the landlord of the neighbouring estate.¹

Revenue maps.—Revenue maps are relevant, but entries therein are not sufficient to establish title to the land.²

Chittahs and field-books.—Chittahs are admissible in evidence, although their value is a matter to be determined by the Court in the particular circumstances of each case.³ A chittah of the revenue survey is a public record, viz., the record of public work carried out by a public servant,⁴ and may therefore be admissible under section 35.⁵ Chittahs and field-books of the survey department are the primary records out of which a survey map is made and are originally component parts of the map⁶ and, on this view of the nature of chittahs, they would be admissible under the present section.⁷ If chittahs are relied upon without any account given or verification made of them, they cannot be treated as evidence of title in boundary disputes;⁸ but where an account is given of the chittahs and they are properly introduced and verified, they become admissible.⁹ But a chittah made by Government for their khas mahal is not a public document;¹⁰ such a chittah is made by Government for its own private purposes and is nothing more than a document prepared for the information of the Collector and is not therefore, per se evidence against private persons for the purpose of proving that the lands described therein are or are not of a particular character or tenure. Neither section 83 nor section 13 is applicable to such chittahs.¹¹ Chittahs are not public documents if they are prepared with the object of ascertaining the lands belonging to the Government without prejudice to the rights of the owners of bahali shares, even if they are availed of by the Government

48. Debendra Nath Bagchi v. Surendra Nath Sur, 102 I.C. 370: 1927 C. 345; Ramanandan Sahay v. Jaogovind Pandey, 2 P. 839: 75 I.C. 955: 1924 P. 213; Dunne v. Dharani Kanta Lahiri, 35 C. 621; Syam Lal Sahu v. Luchman Chowdhury, 15 C. 353; Nobo Coomar Dass v. Gobind Chunder Roy, 9 C. L.R. 305.

49. Mohesh Chunder Sen v. Juggat Chunder Sen, 5 C. 212.

50. Radha Kishun v. Shyam Das, 13 P. 51: 149 I.C. 1095: 1933 P. 671.

1. Radha Kishun v. Shyam Das, 13 P. 51: 149 I.C. 1095: 1933 P. 671.

2. Aung Hla v. Ton Gyi, 35 I.C. 432.

3. Sarat Chandra Rakhit v. Sarala Bala Ghosh, 105 I.C. 61: 1928 C. 63.

4. Mohinee Mohun Roy v. Mohesh Chunder Chowdhry, 24 W.R. 192; but see Ram Chunder Sao v. Bunseedhur Naick, 9 C. 741.

5. Ganguli v. Rajendra Nath Chatterjee, 1 C.W.N. 530.

6. Gopeenath Singh v. Anundmoyee Debia, 8 W.R. 167.

7. Woodroffe, Ev., 9th Ed., 400.

8. Eckowrie Singh v. Heeralal, 2 B. L.R. 4 (P.C.).

9. Sudukhina v. Raj Mohan, 3 B.L.R. 381: 12 M.I.A. 136 (P.C.): see Dinomoni Chowdhurani v. Brojo Mohini, 29 C. 187: 29 I.A. 24 (P.C.); Matiwor Rasuk Alikar Rasul v. Dhanu Molla, 59 I.C. 963.

10. Ram Chunder Sao v. Bunseedhur Naick, 9 C. 741; see Sarat Chandra Rakhit v. Sarala Bala Ghosh, 105 I.C. 61: 1928 C. 63, where the ruling in Ram Chunder v. Banseedhur, 9 C. 741, has been explained.

11. Upendra Nath Chattopadhyay v. Radha Govinda Bandopadhyay, 98 I.C. 85: 1927 C. 199.

for assessment of land revenue; but they become public documents if they are prepared for a public purpose, such as the distribution of revenue on the shares, or assessment and settlement of revenue on the share belonging to the Government.¹² There is no provision of law which makes a survey map inadmissible in evidence without the field-book. The failure to produce the field-book affects the weight to be attached to the map and not its admissibility.¹³ A **chittah** prepared by a **zamindar** recording the suit land as being in the possession of tenants is not admissible.¹⁴ As to survey maps becoming admissible under section 13 or section 21, see **Collector of Rajshahye v. Doorga Soonduree Debia**;¹⁵ for the various kinds of **chittahs** and their weight and admissibility, see *Field, Ev.*, 8th Ed., 242.

Topographical survey maps.—Topographical survey maps are prepared by survey officers acting under the authority of Government and are admissible under section 36. Section 36 does not lay down that the authority under which the maps are prepared must be authority given by statute. These maps are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they were made. They are not conclusive and may be shown to be wrong; but, in the absence of anything to the contrary, they may be properly judicially received in evidence as correct when made. They are good evidence of possession in cases of boundary disputes.¹⁶

Thakbast maps and thak khasra.—A regular survey of a district is preceded by a preliminary measurement by an **amin** who lays down on a rough map the locality, without any guarantee of scientific accuracy, and enters in a register particulars regarding the plots gathered from the people. The map is called the **thakbast** map, and the register the **thak khasra**.¹⁷ The word "**thak**" literally means a small boundary demarcation mark.¹⁸ The **thak** survey is conducted by the Settlement Officer before the scientific work of the revenue surveyor is commenced. The Settlement Officer's duty is first to settle all boundary disputes on the spot and then to demarcate on the ground the actual boundaries of villages and estates. This is done by placing **thak** marks or **dhuis** (generally large mud pillars about five feet high, although they might assume other forms) at the principal bends in the village and at all trijunction points. These marks are shown on a map which is called the **thak** map. The **thak** map is, therefore, a rough sketch or, at most, an unscientifically prepared plan showing the number and approximate position of the **thak** marks or **dhuis** for the guidance of the revenue surveyor who follows after, and who, after picking up and verifying the **thak** marks in the **thak** maps, prepares the revenue map by accurate observation with scientific instruments.¹⁹ There are three kinds of **thak** maps: (i) eye sketches in which

12. *Narendra Kishore Roy v. Rahima Banu*, 31 I.C. 695: 19 C.W.N. 1015.

13. *Shashi Bhusan Banerji v. Ramjas Agarwala*, 3 P. 85: 83 I.C. 205: 1924 P. 402.

14. *Abdul Khalique v. Sushil Chandra Chaudhri*, 39 C.W.N. 330.

15. 2 W.R. 210.

16. *Gajhoo Damar Singh v. Jagat Pal Singh*, 2 I.C. 648: 9 C.L.J. 415.

17. *Jagdeo Narain Singh v. Baldeo Singh*, 2 P. 38: 49 I.A. 399: 71 I.C. 984: 1922 P.C. 272.

18. *Shashi Bhusan Banerji v. Ramjas Agarwala*, 3 P. 85: 83 I.C. 205: 1924 P. 402.

19. *Keshabji Pitamber v. Shashi Bhusan Banerji*, 96 I.C. 1027: 1926 P. 385.

no actual measurements are made: (ii) maps in which rough magnetic bearings are used, and rough linear measurements made, and (iii) maps made from careful magnetic bearings and careful linear measurements.²⁰ The first two kinds of maps are not intended to be more than a rough guide to the revenue surveyor. The third class of maps is more accurate and more reliable.²¹

Presumption of accuracy of thak maps.—There is no presumption that the thak maps are incorrect;²² on the contrary, there is a *prima facie* presumption of their being correct.²³ Of course, they are not conclusive²⁴ and may be shown to be incorrect by the admissions of parties or adjudication by a Court or by evidence, intrinsic or extrinsic to the map;²⁵ but, in the absence of any such rebutting evidence, they may be properly judicially received in evidence as correct when made.²⁶ Of course, thak maps cannot be expected to give mathematical accuracy, but only substantial accuracy.²⁷

Evidentiary value of thak maps.—The value of thak maps depends on their accuracy.²⁸ It varies enormously. "In the case of a thak map containing definite landmarks and undisputed boundaries signed by the parties or their accredited agents, and representing land which has been brought under cultivation and is in the possession of the raiyats whose names are known or can be ascertained from the zamindari papers, a thak map is very valuable evidence of possession. But the value of such a map is greatly diminished when we find that there are no natural landmarks delineated thereupon, that the land was jungle when measured, that the boundaries are not discoverable from a mere inspection of the map, and that neither the zamindars nor their agents have by their signatures admitted the correctness of the thak.²⁹ If a thak map is signed by the parties or their agents, or if it was prepared in the presence of the parties, the map may fairly be taken to be an admission by the parties of the boundary lines between adjoining villages.³⁰ An entry in a thakbast khasra has no evidentiary value unless it is proved that the persons adversely affected thereby had notice of it and opportunity to controvert it, but knowingly acquiesced in the entry by the amin who prepared the khasra in connection with the measurement preliminary to the survey of

20. Kesabji Pitamber v. Shashi Bhusan Banerji, 96 I.C. 1027: 1926 P. 385; Shashi Bhusan Banerji v. Ramjas Agarwala, 3 P. 85: 83 I.C. 205: 1924 P. 402.

21. Keshabji Pitamber v. Shashi Bhusan Banerji, 96 I.C. 1027: 1926 P. 385.

22. Krishna Kalyani Dasi v. Braunfield, 36 I.C. 184: 20 C.W.N. 1028.

23. Taramoni Chaudhurani v. Gopal Das Chaudhury, 65 I.C. 182.

24. Gokul Chandra Das, etc. v. Hara Sundari Dasi, etc. 9 C.W.N. 383; see also Sateowri Ghosh Mandal v. Secretary of State, 22 C. 252.

25. Taramoni Chaudhurani v. Gopal Das Chaudhury, 65 I.C. 182.

26. See notes to this section under the

heading "survey maps are good but not conclusive evidence of possession; presumption as to their accuracy".

27. Krishna Kalyani Dasi v. Braunfield, 36 I.C. 184: 20 C.W.N. 1028.

28. Krishna Kalyani Dasi v. Braunfield, 36 I.C. 184: 20 C.W.N. 1028.

29. Joytara Dassee v. Mahomed Mo-barack, 8 C. 975.

30. Maharaja of Cooch Behar v. Mohendra Ranjan Rai Choudhuri, 66 I.C. 923: 1921 C. 277; Dunne v. Dharani Kanta Lahiri, 35 C. 621; Kumar Raj Krishna Prasad Lal Singh Deo v. Baraboni Coal Concern, Ltd., 62 C. 346: 1935 C. 368: 159 I.C. 98.

the village.³¹ The weight to be attached to such documents is in direct ratio to the opportunities which existed of objecting to the demarcation made by the officers.³² If there is an entry in a **thak** map that it was prepared in the presence of the parties or their representatives, the entry is admissible³³ as evidence of an admission of the correctness of the map. A **thak** map and the boundary shown in it can be relied on in preference to the Revenue survey map and the boundary ascertained by the pleader commissioner on the basis of it.³⁴ Notes in a **thakbast** map in respect of an irrigation right made by surveyors who had no authority to record any irrigation rights carry no presumption of correctness.³⁵

Thakbast maps, whether evidence of possession and title?—
Thakbast maps are good evidence of possession at the time the survey was made³⁶; they are also some evidence of title, though not conclusive.³⁷ But they are not evidence of title acquired by prescription or adverse possession,³⁸ nor of the land being **debutter**,³⁹ as the officers conducting the **thakbast** operations are not required to record such matters. The **thak** map, however, affords good substantial evidence of the linear distances between the successive marking points of the boundary lines.⁴⁰

Survey maps and thak maps, whether sufficient evidence of the fact that the land was included in the Permanent Settlement?—The onus of proving that any particular land was included in the Permanent Settlement of 1793 is on the person who affirms that such was the case,⁴¹ and the burden of proof is not necessarily shifted by the production of the **thak** and survey maps showing that specific lands are included in a particular estate. The **thak** and survey maps are valuable evidence of the state of things at the time they were made, but it does not follow that they show conclusively what was the state of things at the time of the Permanent Settlement. It cannot be presumed as a matter of law that the state of things described in the **thak** and survey maps existed

31. Jagdeo Narain Singh v. Baldeo Singh, 2 P. 38: 49 I.A. 399: 71 I.C. 984: 1922 P.C. 273; but see Krishna Promada Devi v. Dhirendra Nath Ghosh, 56 I.A. 74: 56 C. 813: 1929 P.C. 50: 113 I.C. 465.

32. See Dunne v. Dharani Kanta Lahiri, 35 C. 621.

33. Bidhumukhi Dasi v. Jitendra Nath Roy, 4 I.C. 442: 10 C.L.J. 527.

34. Mantajaddin v. Alam, 73 C.L.J. 477.

35. Harihar Prasad Singh v. Janak Dular Kuer, 1941 P. 118.

36. Chattrapat Pratap Bahadur Sahi v. Lees, 72 I.C. 648: 1923 P. 558; Satcowri Ghosh Mondal v. Secretary of State, 22 C. 252; Jautara Dassee v. Mahomed Mobaruck, 8 C. 975; but see Debendra Lal Khan v. Secretary of State, 108 I.C. 13: 1927 C. 403.

37. Satcowri Ghosh Mandal v. Secretary of State, 22 C. 252; but see

Debendra Lal Khan v. Secretary of State, 103 I.C. 13: 1927 C. 403; Ramanandan Sahay v. Jaogovind Pandey, 2 P. 839: 75 I.C. 955: 1924 P. 213; Barada Prasad v. Girindra Kumar Das, P.L.D. 1951 Dacca 174.

38. Chattrapat Pratap Bahadur Sahi v. Lees, 72 I.C. 648: 1923 P. 558.

39. Jarao Kumari v. Lalomoni, 18 C. 224: 17 I.A. 145 (P.C.).

40. See James Burn v. Achumbit Roy, 20 W.R. 14.

41. Kumar Raj Krishna Prasad Lal Singh Deo v. Barabani Coal Concern, Ltd., 62 C. 346: 1935 C. 368: 159 I.C. 98; Secretary of State v. Wazed Ali Khan Pani, 65 I.C. 866: 1921 C. 687; Prafulla Nath Tagore v. Secretary of State, 57 I.C. 29: 31 C.L.J. 320; see also Ramanandan Sahay v. Jaogovind Pandey, 2 P. 839: 75 I.C. 955: 1924 P. 213.

at the time of the Permanent Settlement.⁴² The mere circumstance that the owner of a taluq had possession of a certain property at some time is not conclusive or nearly conclusive evidence of the fact that the property formed part of the taluq at the time of the Permanent Settlement.⁴³ What lands were included in the Permanent Settlement is a question of fact and not of law and it may or may not be satisfactorily proved by subsequent survey maps.⁴⁴ An entry in a thak map is insufficient to show that the land was in the same state at the time of the Permanent Settlement.⁴⁵ A thak map is evidence of the boundaries of a property at the time of the thakbast survey⁴⁶ and it may also be good evidence of what its boundaries were at the time of the Permanent Settlement.⁴⁷ An entry in a thak map that certain lands formed part of a certain estate is relevant under this section and it is open to a Court to hold that the same state of things existed at the time of the Permanent Settlement⁴⁸ and that the land was included in that settlement.⁴⁹ If the boundary lines of the various estates were admitted by the parties at the time of the thakbast survey, the map is strongest evidence that they were so at the time of the Permanent Settlement if there is nothing to show that there has been any change in the physical features of the place.⁵⁰ But *ex parte* statements in survey maps should be treated on the same footing as books of account and regarded not as a primary proof, but merely as corroborative of other evidence. Where such documents relate to distant times, and direct evidence of the matter mentioned there is no longer available, their value assumes greater proportions, and if they indicate a state of affairs which may be presumed as not unlikely to have happened, they may be taken into account and acted upon with more certainty.¹

Survey map disagree with the thakbast map.—There is no general or definite rule making it incumbent upon the Courts to follow either the survey map in preference to the thak map or the thak map in preference to the survey map.² As a general rule, the thak and the survey

42. Secretary of State v. Upendra Narain Roy, 71 I.C. 849: 1923 C. 247; Secretary of State v. Wazed Ali Khan Pani, 65 I.C. 866: 1921 C. 687; Prafulla Nath Tagore v. Secretary of State, 57 I.C. 29: 31 C. L.J. 320; Jagadindra Nath Roy v. Secretary of State for India, 30 C. 291: 30 I.A. 44 (P.C.); Ananda Hari Basak v. Secretary of State for India in Council, 3 C.L.J. 316. For a case where such presumption was raised, see Kumar Raj Krishna Prasad Lal Singh Deo v. Barabani Coal Concern, Ltd., 62 C. 346: 1935 C. 368: 159 I.C. 98.

43. Mohesh Chunder Sen v. Juggut Chunder Sen, 5 C. 212.

44. Sitanath Saha v. Monoranjan Roy, 1939 C. 148; Secretary of State v. Wazed Ali Khan Pani, 65 I.C. 866: 1921 C. 687; Ananda Hari Basak v. Secretary of State for India in Council, 3 C.L.J. 316; see Prafulla Nath Tagore v. Secretary of State, 57 I.C. 29: 31 C.

L.J. 320.

45. Ramanandan Sahay v. Jaogovind Pande, 2 P. 839: 75 I.C. 955: 1924 P. 213.

46. Syama Sunderi Dassya v. Jogobundhu Sootar, 16 C. 186.

47. Ramanandan Sahay v. Jaogovind Pandey, 2 P. 839: 75 I.C. 955: 1924 P. 213.

48. Abdul Hamid Khan v. Kiran Chandra Roy, 7 C.W.N. 849.

49. Fazlar Rahim v. Nabendra Kishore Roy, 15 I.C. 341: 17 C.W.N. 151; see also Moizuddi Biswas v. Ishan Chandra Das Sarkar, 7 I.C. 849: 13 C.L.J. 293.

50. Syama Sunderi Dassya v. Jogobundhu Sootar, 16 C. 186.

1. Kumar Kamakhya Narayan Singh v. Surendra Karan Deo, 113 I.C. 703: 1928 P. 284.

2. Maharaja of Cooch Behar v. Mohendra Ranjan Rai Chaudhuri, 66 I.C. 923: 1921 C. 277; Abid Hossein Mandul v. Dowcurry Pal, etc., 6 C.W.N. 629.

maps should agree. Where, however, they differ, the one that more clearly agrees with the local conditions is the one which should be followed.³ The revenue map must be accepted as showing the result of the **thak** survey even more accurately than the **thakbast** map,⁴ and, therefore, the revenue survey map should ordinarily prevail over the **thakbast** map.⁵ The rule is not, however, absolute.⁶ The signature of the revenue surveyor on a **thak** map means merely that he has satisfied himself that the boundary had been correctly picked up on the ground and correctly surveyed on the revenue survey map.⁷ If the revenue survey map, which was carefully and accurately prepared by competent officers, and the **thakbast** map do not agree, it is quite impossible to rely on the **thakbast** map, unless indeed the demarcation pillars put down on the ground by the **thakbast** authorities are still in existence and correspond with the boundary pillars as shown in the map or the field-book, and the materials collected by the **thakbast** authorities furnish sufficient data.⁸ Where there is no satisfactory direct evidence of acts of possession on the part of either of the parties, the evidence of possession of the cadastral survey entries must prevail until it is rebutted.⁹ If there is any discrepancy between the Gangetic map and a later cadastral survey map, the latter must be given preference.¹⁰

Absence of entry in a survey map or thak map.—The fact that a certain rivulet is not shown in Rennell's map is no proof of the non-existence of that rivulet in Rennell's time.¹¹ The fact that certain land was not shown as **lakhiraj** in the **thak** map of 1852 is not sufficient to show that the land was the **mal** land of the **zamindar** and, therefore, liable to assessment to rent.¹²

Diara map.—The correctness or otherwise of the **diara** map can, under no circumstances, depend upon the correct location of a particular trijunction, where there is nothing to show that the **diara** map was prepared with reference to it. The presumption of correctness of the **diara** map will, in no sense, be rebutted by the mere fact that this particular trijunction has not been located.¹³

Rennell's map.—One of the purposes of the preparation of Rennell's map was the delineation of roads and waterways.¹⁴ The map, therefore,

3. *Maharaja of Cooch Behar v. Mahendra Ranjan Rai Chaudhuri*, 66 I.C. 923: 1921 C. 277.

4. *Keshabji Pitamber v. Shashi Bhushan Banerji*, 96 I.C. 1027: 1926 P. 385.

5. *Shashi Bhushan Banerji v. Ramjas Agarwala*, 3 P. 85: 83 I.C. 205: 1924 P. 402.

6. *Kall Prosanna Bhaduri v. Rani Hementa Kumari Debi*, 79 I.C. 1038: 1924 C. 977; *Maharaja of Cooch Behar v. Mahendra Ranjan Rai Choudhuri*, 66 I.C. 923: 1921 C. 277; *Mantajaddin v. Alam*, 73 C.L.J. 47.

7. *Keshabji Pitamber v. Shashi Bhushan Banerji*, 96 I.C. 1027: 1926 P. 385; *Shashi Bhushan Banerji v. Ramjas Agarwala*, 3 P. 85: 83 I.C. 205:

1924 P. 402.

8. *Shashi Bhushan Banerji v. Ramjas Agarwala*, 3 P. 85: 83 I.C. 205: 1924 P. 402.

9. *Brindraban Prasad v. Gopal Saran Narayan Singh*, 104 I.C. 514: 1928 P. 36.

10. *Radha Kishun v. Shyam Das*, 13 P. 51: 149 I.C. 1095: 1933 P. 671.

11. *Benode Lal Chakravarty v. Secretary of State*, 133 I.C. 573: 1931 C. 239.

12. *Bipradas Pal Choudhury v. Monorama Debi*, 45 C. 574: 47 I.C. 49.

13. *Sri Gobinda Chaudhury v. Secretary of State*, 176 I.C. 341.

14. *Secretary of State v. Ananda Mohan Roy*, 66 I.C. 287: 34 C.L.J. 205.

correctly shows the course of rivers;¹⁵ but it does not show all the rivulets that existed at the time it was prepared.¹⁶ The map has been used as a valuable piece of evidence in several cases,¹⁷ and, when it is referred to as evidence, there is a presumption of its accuracy under section 83 of the Evidence Act in respect of such matters as to which it is admissible in evidence.¹⁸

Other maps and plans.—A mahalwari map is relevant under this section;¹⁹ so is a map made for purposes of a partition which affects the public revenue.²⁰ A khasra or shajra prepared by a patwari who is a public servant is also admissible.²¹ A kistwari map is admissible, and a presumption of the accuracy of physical features represented therein, or of statements as to possession contained therein, may be made.²² Plans made under the Calcutta Survey Act are admissible as evidence of possession, and, therefore, they are of great value on questions of title.²³ A site plan prepared by an officer of a Municipal Board for the purposes of a particular case amounts to an admission in favour of the Board and is not therefore relevant;²⁴ but printed maps prepared by Government showing different wards of a city are admissible.²⁵ A map made by a Deputy Collector for the purpose of the settlement of land forming the sited bed of a river is not one which is admissible in evidence under section 36; but it is a map made for a particular purpose, the accuracy of which must be proved before it can be admitted in evidence.²⁶ The Settlement map in respect of the area of a field is the original record of which the entry in the khasra is a copy in a different notation, and, in case of conflict between these two as regards area, the map is more reliable than the khasra.²⁷ Where the diara operations extend over a very wide area and the diara map is not prepared with reference to any particular survey trijunction of certain mouzahs named the presumption of correctness of the diara map is in no sense rebutted by the mere fact that that particular trijunction has not been located.²⁸

Section 36 and 83.—Section 36 mentions two kinds of maps, namely:—

15. Nand Lal Roy v. Pramatha Nath Roy, 143 I.C. 179: 1933 C. 222; Secretary of State v. Ananda Mohan Roy, 66 I.C. 287: 34 O.L.J. 205; Secretary of State v. Midnapore Zimindari Co., 1941 C. 520.
16. Benode Lal Chakravarty v. Secretary of State, 133 I.C. 573: 1931 C. 239.
17. See Naresh Narayan Roy v. Secretary of State, 50 C. 446: 50 I.A. 121: 77 I.C. 1048: 1923 P.C. 1; Haradas Achariya Chowdhuri v. The Secretary of State, 43 I.C. 361 (P.C.).
18. Secretary of State v. Ananda Mohan Roy, 66 I.C. 287: 34 C.L.J. 205.
19. Madhabi Sundari Dassya, etc. v. Ganganendra Nath Tagore, etc., 9 C.W.N. 111.
20. Abdul Hamid Choudhuri v. Bro. Jendra Kumar Roy Choudhury, 90 I.C. 643: 1926 C. 290.
21. Rahmatulla Khan v. Secretary of State, 63 P.R. 1913: 18 I.C. 799: 113 P.L.R. 1913.
22. Nazirul Haq v. Abdul Wahab Khan, I.P. 65: 64 I.C. 326: 1922 P. 58.
23. Debendra Nath Bagchi v. Surendra Nath Sur, 102 I.C. 370: 1927 C. 345.
24. Gauri Shankar v. E., 120 I.C. 547: 1930 A. 26: 31 Cr. L.J. 133.
25. Secretary of State v. Chimanlal, 1942 B. 161: I.L.R. 1942 B. 357.
26. Kanto Prashad Hazari v. Jagat Chandra Dutta, 23 C. 335.
27. Laharam v. Gurmukhrao, 99 I.C. 628: 1927 N. 204.
28. Sri Gobinda Chaudhuri v. Secretary of State, 1937 C. 574.

- (1) Published maps or charts generally offered for public sale, and
- (2) maps or plans made under the authority of Government.

The first kind is considered relevant, because, the publication, being accessible to the whole community and open to criticism of all, the probabilities are in favour of any inaccuracy being challenged and exposed. But the statements made in such maps or charts are merely relevant. There is no presumption as to their accuracy. On the other hand, section 83 lays down that the Court shall presume that maps or plans purporting to be made by the authority of the Central Government or any State Government were so made and are accurate, but maps or plans made for the purposes of any cause must be proved to be accurate.²⁹

37. When the Court has to form an opinion as to the Relevancy of statement as to fact of public nature contained in certain any Act of Parliament [of the United Kingdom] or in any [Central Act, Provincial Act or [a State Act]³¹ or in a Government notification or notification by the Crown Representative appearing in the Official Gazette or in any printed paper purporting to be the London Gazette or the Government Gazette of any Dominion, colony or possession of His Majesty, is a relevant fact.

COMMENTARY

Principle.—This section makes the recital of a fact of a public nature relevant, if the recital is contained either in any enactment or in any notification appearing in any Indian Official Gazette, the London Gazette, or any Colonial Gazette. "These documents are admissible on grounds similar to those on which entries in public records are received."

29. *Ramkrishore v. Union of India*, A.I.R. 1965 Cal. 282.

30. Inserted by the Adaptation of Laws Order, 1950.

31. The words "Act of the Central Legislature" were substituted for the words "Act of the Governor-General of India in Council," by the Government of India (Adaptation of Indian Laws) Order, 1937. After the words "Act of the Governor-General of India in Council" the original words were "or of the Governors in Council of Madras or Bombay, or of the Lieutenant-Governor in Council of Bengal, or in a notification of the Government appearing in the Gazette of India, or in the Gazette of any Local Government or in any printed paper purporting to be the London Gazette or the Government Gazette of any colony or possession of the Queen, is a relevant fact".

This was amended first by the Repealing and Amending Act, 1914 (10 of 1914), and then by the Government of India (Adaptation of Indian Laws) Order, 1937, to read as "or of any other legislative authority in British India constituted by any law for the time being in force". The words "the Act of the Central Legislature or of any other legislative authority in British India constituted by any law for the time being in force" were substituted by the words "Central Act, Provincial Act or an Act of the Legislature of a Part A State or a Part C State" by the Adaptation of Laws Order, 1950. Further the words "a State Act" was substituted for the words "an Act of the Legislature of a Part A State or a Part C State" by the Part B States (Laws) Act (3 of 1951).

They are documents of a public character made by the authorized agents of the public in the course of official duty and published under the authority and supervision of the State, and the facts recorded therein are of public interest and notoriety. Moreover, as the facts stated in them are of a public nature, it would often be difficult to prove them by means of sworn witnesses".³²

Fact of a public nature.—The fact as to the existence of which opinion has to be formed must be a fact of a public interest and not one of a mere private interest. Thus, where public statutes recited that great outrages had been committed in a particular part of the country, and a public proclamation was issued, with similar recitals, and offering a reward for the discovery and conviction of the perpetrators, these recitals were held admissible and sufficient evidence of the existence of those outrages, to support the averments to that effect in an information for a libel on the Government in relation thereto. So, a recital of a state of war in the preamble of a public statute, is good evidence of its existence, and the war will be taken notice of without proof, whether this country be or be not a party to it.³³ In the case of *Queen v. Amir-ud-Din*,³⁴ the Gazette of India and the Calcutta Gazette, containing official letters on the subject of hostilities between the British Government and certain Muhammadan fanatics on the Frontier, were held to have been rightly admitted in evidence under section 8 of the Repealed Act,³⁵ which generally corresponds to section 37 of the present Act, to prove the commencement, continuation and determination of hostilities. In the subsequent trial of the Wahabi conspirators at Patna, the Gazette was used in evidence for a similar purpose.³⁶ A statement made in the Gazette notification that an Act has been assented to by the President is proof of that fact.³⁷

Recital of a fact of a public nature in a private Act.—In English law, a private Act of Parliament is no evidence against strangers of the facts recited,³⁸ but the present section draws no distinction in this respect between private and public Acts of Parliament and makes the recital admissible whether it is contained in a private Act or in a public Act, provided the fact recited is one of a public nature.

38. When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

COMMENTARY

Proof of foreign law.—The law of British India requires no proof as the Courts are bound to take judicial notice of it.³⁹ This section, there-

32. Woodroffe, Ev., 9th Ed. 402.

33. Taylor, § 1660.

34. 7 B.L.R. 63.

35. Act 11 of 1855.

36. Field, Ev., 8th Ed., 250.

37. K. C. Gajapati Narayana Deo v. The State of Orissa, 1953 Orissa, 185.

38. Taylor, § 1660.

39. Section 57.

fore, applies only when the Court has to form an opinion as to the law of any foreign country, which must be proved like any other disputed question of fact.

Statement of foreign law in authorized books and authorized or unauthorized reports is admissible.—If the statement of the law is contained in a book which is not a report of the rulings of a country, it must purport to be printed or published under the authority of the Government of that country and to contain the law of such country. Thus, in *Christien v. Delanney*,⁴⁰ a statement contained in a translation of the Code Napoleon as to what the French law was on a particular matter was held irrelevant, as the book had not been printed or published under the authority of the French Government. If, however, the statement is contained in a book which purports to be a report of the rulings of a country, the statement is admissible even if the book does not purport to be, and in fact is not, printed or published under the authority of the Government of such country.

The Court may take judicial notice of a publication containing a foreign law, if it is issued under the authority of the foreign Government concerned, and may accept the law as set out in such publication as a law in force in the particular foreign country at the relevant time. But such a publication cannot be evidence that what is contained in it is the whole law.⁴¹

Proof of foreign law by expert testimony.—Foreign law may be proved in India by expert testimony also.⁴² In England, likewise, foreign law may be proved by expert testimony, but it cannot be proved in the manner permitted by this section, viz., by the mere production of the books in which it is contained.⁴³ This section is, therefore, a departure from the English rule.

Foreign law is provable by foreign judgment.⁴⁴

Commercial documents.—Notwithstanding anything contained in the Indian Evidence Act, 1872, statements of facts in issue or of relevant facts made in any document included in the Schedule to Act XXX of 1939 (Commercial Documents Evidence Act) as to matters usually stated in such document shall be themselves relevant facts within the meaning of the Evidence Act.⁴⁵

HOW MUCH OF A STATEMENT IS TO BE PROVED

39. When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of

40. 26 C. 931.

41. *Kumar Jagdish Chandra Sinha v. Commissioner of Income-tax*, 1956 C. 48.

42. Section 45.

43. *Sussex Peerage Case*, 11 C. & F.

114-117.

44. *Suganchand Bhikam Chand v. Mangibai Gulabchand*, 1942 B. 185; 201 I.C. 759; I.L.R. v. 1942 B. 467.

45. For the list of such documents, see Appendix D.

the statement, conversation, document, book or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.

COMMENTARY

Independent parts of a statement not admissible.—If the fact given in evidence is a statement which forms part of a longer statement, or was made in the course of some conversation, or occurs either in a single document or in a document which forms part of a book, correspondence or other papers, the whole statement, conversation, document, book or correspondence is not thereby rendered admissible, and only so much of the statement, conversation, document, book or correspondence can be given in evidence as is necessary for a correct understanding of the nature and effect of the statement and of the circumstances under which it was made. The section is based on the principle that parts of a statement, which are foreign to the admissible part and do not in any way explain or qualify it, are not made admissible merely by reason of their being parts of the statement of which a portion is admissible. Thus, if a police diary is used by a Police Officer to refresh his memory or by the Court to contradict such Police Officer, the accused is entitled to see only the particular entry used by the Police Officer or the Court and so much of the diary as, in the opinion of the Court, may be necessary to the full understanding of the particular entry.⁴⁶ What section 39 makes admissible is what the Court considers necessary in order that a statement may be intelligible.⁴⁷ Because a document has been proved and admitted in evidence, it does not follow that all the recitals, statements and references therein can be used as proof of the facts to which they relate.⁴⁸ Where a document consists of two separate parts, one of which is admissible and the other inadmissible, the document cannot be rejected as a whole.⁴⁹ Although a Court has inherent power to refuse disclosure of matters which in the public interest should be kept secret, it has no power to allow a witness to put in a portion of a letter and to say which portions of it are to go in and which are to be concealed from his opponent. Nor is the Court empowered to hand back to a party a letter, which has once been made an exhibit in the case.⁵⁰

Explanatory or qualifying parts of a statement are admissible.—A sentence or part of a statement detached from its context might lend itself to an entirely different meaning and, therefore, the section makes admissible only such parts of the statement as are necessary to the full understanding of the nature and effect of the statement. Those parts of a statement which qualify or explain the part which is sought to be given in evidence must be admitted to enable the Court to understand the true effect and import of the latter. In the case of a statement in a civil or a criminal proceeding by way of admission or confession, the whole of it must be taken and read together, since thus alone can the whole of that which the person making the statement intended to convey be arrived at.

46. *Q. E. v. Mannu*, 19 A. 390 (F.B.).

47. *Karam Din v. E.*, 115 I.C. 1: 1929 L. 338: 30 Cr. L.J. 385.

48. *Tika Ram v. Moti Lal*, 52 A. 464: 126 I.C. 29: 1930 A. 299.

49. *Mistri Fuzal Din v. Mian Karam Husain*, 1936 L. 81: 162 I.C. 404.

50. *E.A. Morley v. E.*, 1936 R. 299: 164 I.C. 369.

with certainty, that it is obviously unfair to take only that which is against the interest of the declarant, as the very next sentence might contain a material qualification.¹

Parts of a confession, not admissible under section 27, do not become admissible under section 39.—Section 39 is not drafted for the purpose of section 27 alone, but is a general section and the words “nature and effect” of the statement are meant in that section to apply both to the inherent character of the statement and the meaning of the statement or the effect produced by the statement, if the word “effect” has a wider meaning. It is possible that in a particular case the prosecution may wish to prove the exact words used by the accused and in that case section 39 would apply. But so far as the admissibility of the words deposed to is concerned, it is still governed by the provisions of section 27.² This section cannot be invoked for the purpose of letting in a confession in respect of which the bar created by sections 24, 25 and 26 has not been removed by section 27. It was never intended that a matter which has been expressly ruled out should be allowed to come in, in the garb of an explanatory statement.³

JUDGMENTS OF COURTS OF JUSTICE WHEN RELEVANT

40. The existence of any judgment, order or decree which Previous judgments relevant to bar a second suit to trial, by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold such trial.

COMMENTARY

Previous judgments admissible in support of a plea of *res judicata* or of *autrefois acquit* or *autrefois convict*—A previous judgment, order or decree is relevant when it is tendered in evidence in support of a plea of *res judicata* in civil cases,⁴ or of *autrefois acquit* or *autrefois convict* in criminal cases.⁵ “The plea of *res judicata* as a bar to an action belongs to the province of adjective law, *ad litis ordinationem*, but difference of opinion prevails among jurists as to whether the rule belongs to the domain of procedure or constitutes a rule of the law of evidence as furnishing a ground of estoppel. In England, and I may say also in America, the rule is usually dealt with as belonging to the law of evidence, for there judgments in *personam*, which operate as *res judicata*, are as often treated as falling under the category of estoppels by record. Sir Fitzjames Stephen, the distinguished jurist who framed our Indian Evidence Act, 1 of 1872, and whose views have been accepted by our Indian Legislature in framing section 40 of that Act, adopted what seems to me the only logical and juristic classification by treating the rule of *res judicata* as falling beyond the proper region of the law

1. Woodroffe, Ev., 9th Ed., 406.

2. Karam Din v. E., 115 I.C. 1: 1929 L. 338: 30 Cr. L.J. 385.

3. Sukhan v. E., 10 L. 283: 115 I.C. 6: 1929 L. 344: 30 Cr. L.J. 414

(F.B.).

4. See section 11, C.P. Code; Bholu Nath v. Manmoth Nath, 45 C.W.N. 420.

5. See section 403, Cr. P. Code.

of evidence, and as appertaining to procedure properly so called.⁶ This section declares that if there is a previous judgment, order or decree which, according to the law of procedure, has the effect of preventing a Court from taking cognizance of a suit or from holding any trial, and in a subsequent litigation it is pleaded by a party that the Court cannot, by reason of the previous judgment, order or decree, take cognizance of the suit or hold the trial, the previous judgment, order or decree is relevant in support of such plea. The question as to what previous judgments, orders or decrees have the effect of preventing a Court from taking cognizance of a suit or holding a trial is purely a question of procedure, and must be decided with reference to the relevant provisions of the Civil Procedure Code in civil cases and of the Criminal Procedure Code in criminal cases, the Evidence Act, as mentioned above, having nothing to do with this matter. This section merely renders possible proof of the circumstances which, according to the law of procedure, preclude a Court from trying any particular matter. It applies to a case in which the Court has jurisdiction to decide a matter, and one party says that it should not do so because that matter has been decided before.⁷

A Court may be prevented from proceeding with the trial of a suit, because a previously instituted suit involving the same matter is pending between the same parties,⁸ or because there has been a previous decision on the same matter between the same parties by an Indian⁹ or a foreign¹⁰ Court, or because the relief sought in the subsequent suit is one which could have been claimed by the plaintiff in the previously decided case,¹¹ or because the previous suit was dismissed for default.¹² In criminal cases, a Court cannot try an accused person for an offence if he has been previously tried by a competent Court for the same offence, nor can a person be tried for any other offence for which he could have been tried and convicted in a previous trial.¹³

The provisions of sections 40 to 43 only exclude judgments as pieces of conclusive evidence. They do not bar the admission of judgments as proof of the fact of litigation, or its results and effects upon the parties, which make a certain course of conduct probable or improbable on the part of one of the parties. Thus, in view of the previous litigation and its result that one of the parties was actually in possession, that fact can be used to corroborate the evidence given in the subsequent proceedings.¹⁴

"Holding a trial" includes trial of an issue.—Under section 11, C. P. Code, an issue in the suit, as distinguished from the whole suit, may be *res judicata*. Where it is pleaded that an issue in the subsequent suit is *res judicata*, the previous judgment is relevant, the words "holding a trial" being wide enough to cover such a case. The section was intended to include all judgments which by law operate to prevent a Court,

6. *Sita Ram v. Amir Begam*, 8 A. 324, per Mahmood, J.

7. *Lakshan Chandra Naskar v. Ramdas Mandal*, 118 I.C. 857: 1929 C. 374 (F.B.).

8. Section 10, C.P. Code.

9. Section 11, C.P. Code.

10. Section 13, C.P. Code.

11. O. 2, r. 2, C.P. Code.

12. O. 9, r. 8, C.P. Code.

13. Section 403, Cr. P. Code. See section 26 of the General Clauses Act, and Article 20 Clause (2) of the Constitution.

14. *Shiv Charan v. State*, A.I.R. 1965 A. 511.

whether civil or criminal, from taking cognizance of a suit or trying any particular issue. "The words 'holdings a trial' are amply large enough to admit of this construction, and it is not because in some other Act the words 'holding a trial' may have been construed to refer to criminal trials only, that we ought to confine their meaning in the same way in section 40 of the Evidence Act".¹⁵

Only appellate judgment must be produced.—When a judgment becomes admissible under section 40, the judgment that can be given in evidence is the judgment of the appellate Court, as the judgment of the first Court gets merged in the judgment of the appellate Court. See notes to section 13 under this heading.

Judgment given in evidence under section 40 may be attacked on any such ground as is mentioned in section 44.—See notes to section 44.

41. A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

Such judgment, order or decree is conclusive proof—

that any legal character, which it confers accrued at the time when such judgment, order or decree came into operation;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, [order or decree] declares it to have accrued to that person;

that any legal character which it takes away from any such person ceased at the time from which such judgment, ¹⁶[order or decree] declared that it had ceased or should cease;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment ¹⁶[order or decree] declares that it had been or should be his property.

15. Per Garth, C.J., in *Gajju Lal v. Fateh Lal*, 6 C. 171 (F.B.).

16. Inserted by section 3 of the Indian Evidence Act, Amendment Act

(18 of 1872).

16. Inserted by section 3 of the Indian Evidence Act, Amendment Act (18 of 1872).

COMMENTARY

Judgments in personam and judgments in rem.—The general rule is that a person is not bound by a transaction to which he was not a party. *Res inter alias acta alteri nocere non debet.*¹⁷ This rule equally applies where the transaction is a litigation, between strangers. *Res inter alios judicata nullum inter alios prejudicium facit.*¹⁸ If there is one rule of law which is better known and approved than another, as being founded upon the most manifest justice and good sense, it is this that no man ought to be bound by the decision of a Court of Justice unless he or those under whom he claims were parties to the proceedings in which it was given.¹⁹ This is on the principle that it would be unjust to bind any person by the result of a litigation in which he could not be admitted to make a defence or to examine or cross-examine witnesses or to appeal from a judgment which he might think erroneous.²⁰ To this general rule, however, there are certain exceptions, of which the one enacted by the present section is perhaps the most important. Section 41 makes certain judgments not only relevant against strangers but makes them conclusive of certain matters. Though the section does not use the term judgment in rem, it incorporates the law on the subject of judgments in rem as explained by Sir Barnes Peacock in *Kanhya Lal v. Radha Churn*.²¹

As applied to judgments, the terms "in rem" and "in personam", which are adopted from, though not belonging to, the Roman Law, have never been clearly defined in reference to our own or any other system,²² and great misunderstanding and error have resulted from the use of the term "judgment in rem" in some of the English text books without any precise definition and indeed, in some cases, without any accurate conception of its meaning.²³ It is, therefore, interesting to notice briefly how the term came to be used in the text books.

The term "in rem" was used in Roman Law in connection with *actio* but not in connection with *jus*.²⁴ An *actio in rem* went upon the right to or over the thing whereas an *actio in personam* went upon the right against or over the individual only. An *actio in rem* created what was in fact a right good against all mankind. The effect of an *actio in rem* was to conclude the whole community, but the effect of an *actio in personam* was to conclude the individual only. This effect was an accident arising from the peculiar system of Roman procedure. After Roman forms of procedure had passed away, the term "in rem" survived to express the effect of an *actio in rem* and gradually it came to import "gene-

17. A matter transacted between one set of persons ought not to injure or affect another person.

18. A matter adjudicated upon between one set of parties in nowise prejudices another set of parties.

19. Per Garth, C.J., in *Gajju Lal v. Fateh Lal*, 6 C. 171 (F.B.).

20. See the remarks of De Grey, C.J., in *Duchess of Kingston's case*, 20 How. St. Tr. 355, 544.

21. 7 W.R. 338 (F.B.). See the

report of the Select Committee; Field, Ev., 8th Ed., 351, 360; *Firm of Radhakishen v. Gangabai*, 110 L. C. 730: 1928 S. 121.

22. Phipson, Ev., 7th Ed., 395; Steph. Dig., Note XXIII.

23. *Kanhya Lal v. Radha Churn*, 7 W. R. 338 (F.B.), per Peacock, C.J.; see remarks of Holloway, J., in *Yarkalamna v. Anakala Naramma*, 2 M.H.C.R. 276.

24. Field, Ev., 8th Ed., 363.

ality". When civilians of the 12th and the 13th centuries made their division of rights which avail against the world and rights which avail against individuals only, they employed the phrase "**jus in rem**" to signify the former and the phrase "**jus in personam**" to signify the latter kind of right. Later lawyers compounded the terms "**in rem**" and "**in personam**" with judgments and coined the expressions "**judgments in rem**" and "**judgments in personam**", the former to signify judgments which are good against all mankind and the latter to signify judgments which are good only against the individuals who are parties to them and their privies.²⁵ "The only definition of a judgment **in rem** which can properly be given is that it is a judgment which binds all men, and not only the parties to the suit in which it was passed and their privies; and that it belongs to positive law to say what judgments are to be judgments **in rem**, whether for reasons of international comity or of domestic expediency".²⁶ The point adjudicated upon in a judgment **in rem** is always as to the status of the **res** and is conclusive against the world as to that status, whereas in a judgment **in personam** the point, whatever it may be, which is adjudicated upon, it not being as to the status of the **res**, is conclusive only between parties or privies.²⁷ A decision **in rem** not merely declares the status of the person or thing, but **ipso facto** renders it such as it is declared; thus, a decree of divorce not only annuls the marriage, but renders the wife **feme sole**, adjudication in bankruptcy not only declares, but constitutes the debtor a bankrupt; a sentence in a prize Court not merely declares the vessel prize, but vests it in the captor.²⁸

Final judgment, order or decree.—The word "final" is used in this section as distinguished from "interlocutory" and does not mean not subject to appeal.²⁹

Only appellate judgment must be produced.—See notes to section 13 under this heading.

Judgments in rem conclusive of matters actually decided; foreign judgments in rem.—Subject to impeachment on the grounds mentioned in section 44,³⁰ a domestic judgment **in rem** is in civil proceedings conclusive evidence for or against all persons, whether parties, privies or strangers, of the matters actually decided.³¹ It is also, as between parties and privies, conclusive of the grounds of the decision where these have been put in issue and actually decided by the Court; but, as between strangers or a party and a stranger, it is no evidence of the truth of such grounds, except upon questions of prize where it is conclusive if the ground of condemnation is plainly stated.³² Where in an order of adjudication a transfer has been found to be fraudulent and therefore an

25. See on this subject, Field, Ev., 8th Ed., 360-364, the judgment of Sir Barnes Peacock, C.J., in *Kanhya Lal v. Radha Churn*, 7 W.R. 338 (F.B.), and the judgment of Holway, J. in *Yarakalamma v. Anakala Naramma*, 2 M.H.C.R. 276.

26. Field, Ev., 8th Ed., 364.

27. *Firm of Radhakishen v. Gangabai*, 110 I.C. 730: 1928 S. 121; *Ballantyne v. Mackinnon*, (1896) 2 Q.B. 455.

28. Phipson, Ev., 7th Ed., 397.

29. *Huntly v. Gaskell*, (1905) 2 Ch. 656 C.A.; Phipson, Ev., 7th Ed., 393.

30. *Sita Devi v. Gopal Saran Narayan Singh*, 111 I.C. 762: 1928 P. 375.

31. Phipson, Ev., 7th Ed., 395; Taylor, § 1673.

32. Phipson, Ev., 7th Ed., 395; Taylor, §§ 1733-34; see *Kanhya Lal v. Radha Churn*, 7 W.R. 338 (F.B.); *Firm of Radhakishen v. Gangabai*, 110 I.C. 730: 1928 S. 121.

act of insolvency, the finding, under section 116 of the Presidency Towns Insolvency Act, is conclusive against the transferee even though it was passed in his absence and without notice to him.³³ In England, a foreign judgment *in rem* is generally conclusive against strangers only upon questions of prize, where the ground of condemnation is plainly stated; or of marriage and divorce, where the marriage was solemnised and the parties domiciled in the foreign country;³⁴ or of bankruptcy, as to contracts made in such country; or of probate, administration, and guardianship to a limited extent.³⁵ In India, there is no legislative provision recognizing the conclusive operation of foreign judgments *in rem* against strangers, as section 13 of the Civil Procedure Code limits the conclusiveness of foreign judgments between the parties thereto and their privies. It seems, however, that on the analogy of the practice of the English Courts, foreign judgments *in rem* will receive in India the same recognition as is accorded to them in England.³⁶

Reasons of the conclusiveness of judgments in rem.—The principle of the conclusiveness of judgments *in rem* as regards persons is, that public policy for the peace of society requires that matters of social status should not be left in continual doubt; and as regards things that, generally speaking, everyone who can be affected by the decision may protect his interest by becoming a party to the proceedings.³⁷

Judgment in rem, whether conclusive in criminal proceedings?—In English law, a judgment *in rem* is not conclusive in criminal proceedings.³⁸ In India, however, it seems that a judgment of the kind mentioned in section 41 will be conclusive in civil as well as criminal proceedings.³⁹ See also notes under the heading "order granting probate, whether conclusive answer to a criminal prosecution?"

Construction and Interpretation of the section.—Section 41 of the Indian Evidence Act consists of two parts. The first part makes certain judgments relevant. The second part makes the judgments conclusive evidence of certain matters. The conditions necessary for making a judgment relevant may be considered under two heads: those having reference to the contents of the judgment, and those to the nature of the proceedings in which the judgment is sought to be relied upon. Firstly, with reference to the judgment alleged to fall under section 41, it must be: (i) of a competent Court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction; (ii) it must (a) confer upon or take away from any person any legal character or (b) declare any person to be entitled to any such character or (c) to be entitled to any specific thing, not as against any specified person, but absolutely. Secondly with

33. *Mohammad Siddique Yousuf v. Official Assignee of Calcutta*, 1943 P.C. 130: 70 I.A. 93.

34. *Bater v. B.*, (1906) P. 209.

35. *Phipson, Ev.*, 7th Ed., 395; *Taylor* § 1732—1738; *Pigott on Foreign Judgments*, 244; *Foote on International Law*, 5th Ed., 622: 628 2 *Smith L.C.*, 13th Ed., 722: 754.

36. See *Woodroffe, Ev.*, 9th Ed., 417; *Sita Devi v. Gopal Saran Narayan Singh*, 111 I.C. 762: 1928 P. 375.

37. *Phipson, Ev.*, 7th Ed., 397; *Taylor*, § 1676.

38. *R. v. Buttery, Rus & Ry.*, 342; *Phipson, Ev.*, 7th Ed., 419; *Taylor*, § 1680-81; see the case of the *Duchess of Kingston*, 20 How. St. Tr. 355.

39. *Field, Ev.*, 8th Ed., 367; *Woodroffe Ev.*, 9th Ed., 419; *Manianah Debi, etc. v. E.*, 4 C.W.N. clxxvi; *Mansharam v. Chetauram*, 1945 S. 32.

regard to the proceedings in which the said judgment is sought to be relied upon as a piece of evidence, the existence of any such legal character or the title of any such person to any such thing must be relevant.⁴⁰ Section 41 of the Evidence Act makes no distinction between a positive or a negative judgment or between the point adjudicated upon and the grounds on which the decision is based, but it arrives at the same result in a more simplified manner. It declares the purposes for which the judgment of a competent Court operates as conclusive against the world and, so far as such purposes relate to the status or what is referred to as "the legal character" of a person, it specifies three purposes only: it provides that the judgment is conclusive proof only for showing (a) that the judgment has conferred a legal character on a person; or (b) that it has declared that a person had such legal character; or (c) that it has declared that any legal character of a person which subsisted had ceased to exist.⁴¹ The expression "legal character" must be narrowly construed. "Legal character" means something equivalent to status. The legal character assigned to a person announces to all the world what the legal status of the person in question is.⁴² In order that declaration of title to a specific thing should have a conclusive character as against the whole world, it is not enough to show that under the judgment of the Court one has become entitled to a specific thing, but his title to such a thing must have been declared not as against any specified person but absolutely. A right to recover a debt or a chose-in-action cannot be deemed to be a specific thing.⁴³

What is a matter of status.—The status of a person means his "personal legal condition", that is, a man's legal condition only so far as his personal rights and burdens are concerned, to the exclusion of his "proprietary relation". An adjudication on adoption in law amounts to a declaration of status. But the claim to succession is not a matter of status in this sense, and relates to the proprietary relation of the claimant with reference to the deceased estate holder.⁴⁴

Judgments of probate Courts.—The law connected with the grant of probates and letters of administration has been consolidated into a single enactment.⁴⁵ Under sections 264 and 300 of the Indian Succession Act,⁴⁶ the District Judge and the High Court have concurrent jurisdiction to grant and revoke probates and letters of administration. Probate can be granted only to the executor appointed by the will;⁴⁷ but if no executor has been appointed by the will, or if the executor appointed by the will renounces or fails to accept the executorship, or if the deceased died intestate, then only letters of administration to the estate of the deceased can be granted.⁴⁸ Thus, an "executor" is a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided, whereas an "administrator" is a person appointed by competent authority to administer the estate of a deceased person when

40. *Firm of Radhakishen v. Gangabal*, 110 I.C. 730: 1928 S. 121.

41. *Firm of Radhakishen v. Gangabal*, 110 I.C. 730: 1928 S. 121.

42. In the matter of Venkataramanayya Pantulu, 54 M. 601: 131 I.C. 817: 1931 M. 441.

43. In the matter of Venkataramanayya Pantulu, 54 M. 601: 131 I.C.

817: 1931 M. 441.

44. *Duggamma v. Ganeshayya*, 1963 Mys. 97, at 101.

45. Act XXXIX of 1925, Indian Succession Act.

46. Act XXXIX of 1925.

47. Section 222, Act XXXIX of 1925.

48. See sections 232, 231, 218 & 219 of Act XXXIX of 1925.

there is no executor.⁴⁹ The expression "legal character", when it has reference to a judgment of Court of probate, means the status of an executor or administrator only.⁵⁰ The legal character of an executor is declared, not conferred, while that of an administrator is conferred, not declared, by the judgment of a probate Court granting probate to an executor and letters of administration to an administrator.¹ Section 41 is applicable to probates granted to Hindus before the passing of the Hindu Wills Act² as well as to probates granted after that enactment.³

An order for grant of probate operates as judgment in rem.⁴

A judgment of Court, granting probate in the exercise of Probate jurisdiction, is the 'Probate' defined in section 2(f) of the Indian Succession Act, for it is the grant which declares or confers the legal character on the propounder or the applicant.⁵

Judgment in rem—Presumption regarding probate judgment.—The judgment of the Probate Court must be presumed to have been obtained in accordance with the procedure prescribed by law and it is a judgment in rem. The objection that the respondents were not parties to it, is unsustainable because of the nature of the judgment itself.⁶

Order granting probate conclusive against parties, privies and strangers, of the appointment of the executor or the administrator, and of due execution, validity and contents of the will.—The words "final judgment, order or decree" in reference to the probate Court mean the judgment, order or decree of the Court by which the grant is actually issued, for it is only the grant which declares or confers the legal character on the propounder. Therefore an order merely granting letters of administration to the applicant with a copy of the will annexed on condition that he executes the usual bond is not a final judgment, order or decree.⁷ A judgment in rem is conclusive evidence for or against all persons, whether parties, privies, or strangers of the matters actually decided.⁸ All that is essential to the decision that the executor is entitled to the probate must be taken to have been conclusively determined by the probate Court;⁹ but a finding not essential to the judgment in a probate action cannot operate as a finding in rem.¹⁰ A grant of probate or of administration is conclusive of the appointment of the executor or the administrator.¹¹ It actually invests the executor or administrator with

49. Section 2 (c), (a), Act XXXIX of 1925.

50. *Mi Ngwe Zan v. Mi Shwe Taik*, 10 I.C. 987.

1. *Grish Chander Roy v. Broughton*, 14 C. 861.

2. XXI of 1870.

3. *Grish Chunder Roy v. Broughton*, 14 C. 861; *Field Ev.*, 8th Ed., 305.

4. *Malati v. Dhanapati*, 66 C.W.N. 879.

5. *Satyacharan v. Hrishkesh*, 63 C. W.N. 615.

6. *Surinder Kumar v. Gian Chand*, 1958 S.C.R. 584; 1957 S.C.J. 159, 1958 S.C.A. 412.

7. *Hari Lal Chatterjee v. Sarat Chandra Chatterjee*, 43 C.W.N. 824.

8. *Phipson, Ev.*, 7th Ed., 395.

9. *Chandreswar Prosad Narain Singh v. Bisheswar Pratap Narain Singh*, 5 P. 777; 101 I.C. 289; 1927 P. 61.

10. *Chandreshwar Prasad Narain Singh v. Bisheshwar Pratap Narain Singh*, 5 P. 777; 101 I.C. 239; 1927 P. 61.

11. *Allen v. Dundas*, (1780) 3 T.R. 125; *Phipson, Ev.*, 7th Ed., 418; *Hari Lal Chatterjee v. Sarat Chandra Chatterjee* 43 C.W.N. 824; *Daropati v. Santi*, 116 I.C. 452; 1929 L. 483; *Chandreshwar Prasad Narain Singh v. Bisheshwar Pratap Narain Singh*, 5 P. 777; 101 I.C. 289; 1927 P. 61; *Sheoparsan Singh v. Ramanandan Prashad Narayan*

the character which it declares to belong to him, and is conclusive against all the world.¹² A judgment of a Court of probate is conclusive proof of the fact that the person to whom probate or letters of administration have been granted has been clothed with the power and the responsibilities of the deceased;¹³ It is conclusive proof of the representative title of the grantee against all debtors of the deceased and all persons holding property which belonged to the deceased.¹⁴ A final order of a competent probate Court granting probate is conclusive proof of the due execution and validity of the will¹⁵ as well as of its contents.¹⁶ So long as a grant issued by a probate Court is in force, it is not open to a party to question it in a civil Court¹⁷ except any such ground as is mentioned in section 44.

Other matters of which the probate is conclusive evidence.—When a grant of probate is produced in evidence, it may be shown that the grant was revoked or that it was forged or that it was made by a Court having no jurisdiction;¹⁸ but it cannot be shown that the testator was insane, or that the will or any part of it was procured by fraud¹⁹ or that words were inserted by mistake and without the knowledge of the testator;²⁰ or that the will was forged, for these facts could have been alleged in the Court granting the probate in opposition to such grant.²¹

Order of a probate Court cannot be questioned by any other civil Court.—The order of a probate Court granting probate is the decree of a Court which no other Court can set aside, except for fraud or want of jurisdiction.²² The judgment of a probate Court, while it remains in force, is not subject to any collateral attack and is conclusive not only against the parties to the proceeding but against all persons and all Courts.²³ If probate or letters of administration have been wrongly

Singh, 43 C. 694; 43 I.A. 91: 33 I.C. 914; 1916 P.C. 78; Chintaman Vyankatrao Ghadge v. Ramchandra Viyankatrao Ghadge, 34 B. 589: 7 I.C. 944; Hormusji Navroji v. Bai Dhanbaji, 12 B. 164.

12. Field, Ev., 8th Ed., 365.

13. Mi Ngwe Zan v. Mi Shwe Taik, 10 I.C. 987.

14. Jagannath Prasad Gupta v. Ranjit Singh, 25 C. 354, 369.

15. Thakurain Raj Rani v. Dwarkanath Singh, 223 I.C. 206; Hari Lal Chatterjee v. Sarat Chandra Chatterjee, 43 C.W.N. 824; Sheoparsan Singh v. Ramanandan Prashad Narayan Singh, 43 C. 694; 43 I.A. 91: 33 I.C. 914; 1916 P.C. 78; Phekni v. Manki, 9 P. 698: 128 I.C. 128; 1930 P. 618; Daropti v. Santi, 116 I.C. 452; 1929 L. 433; Chandreshwar Prosad Narain Singh v. Bisheshwar Pratap Narain Singh, 5 P. 777: 101 I.C. 289; 1927 P. 61; Chintaman Vyankatrao Ghadge v. Ramchandra Vyankatrao Ghadge, 34 B. 589: 7 I.C. 944; Sarada Kanta Das v. Gobinda Mohan Das, 12 C.L.J. 91: 6 I.C. 912; Hormusji

Navroji v. Bai Dhanboji, 12 B. 164.

16. Chintaman Vyankatrao Ghadge v. Ramchandra Vyankatrao Ghadge, 34 B. 589: 7 I.C. 944; Hormusji Navroji v. Bai Dhanbaji, 42 B. 164; Pinney v. P., 8 B. & C. 335; Phipson, Ev., 7th Ed., 418.

17. Sheoparsan Singh v. Ramanandan Prashad Narayan Singh, 43 C. 694; 43 I.A. 91: 33 I.C. 914; 1916 P.C. 78.

18. Field, Ev., 8th Ed., 365.

19. Meluish v. Milton, 3 Ch. D. 27.

20. Phipson, Ev., 7th Ed. 418.

21. Field Ed., 8th Ed. 365.

22. Sheoparsan Singh v. Ramanandan Narayan Singh, 43 C. 694; 43 I.A. 91: 33 I.C. 914; 1916 P.C. 78; Annoda Charan Mondal v. Atul Chandra Malik, 54 I.C. 197: 34 C. L.J. 3; Brendon v. Shrimant Sunderbai, 38 B. 272: 23 I.C. 221; Komollochun Dutt v. Nilruttun Mundle, 4 C. 300.

23. Hemanaini Debi v. Sarat Sunderi Debya, 66 I.C. 882: 1921 C. 292; Raj Kishore Prasad v. Promoda Behari Singh, 1944 P. 182: 22 P. 756.

granted, the proper course is to apply to the probate Court itself for revocation of the probate or letters of administration.²⁴

Order granting probate, whether conclusive answer to a criminal prosecution?—In England, on a charge of forging the will, the order of grant of probate is not conclusive of the genuineness of the will.²⁵ In India, however, it seems that a criminal Court is bound by the decision of the probate Court,²⁶ particularly if the Court found in favour of the genuineness of the will, on a distinct issue raised in the proceeding. If a probate Court has found a will to be genuine, it is not open to a criminal Court to find to the contrary, or to convict a person of having forged the will.²⁷ If a probated will is subsequently found to be forged, the proper course is not a criminal prosecution of the alleged forger but an application to the probate Court for revocation of the probate.²⁸ But the grant of letters of administration, though it operates as a judgment in rem and presupposes the non-existence of a will is no bar to the prosecution of a person under section 477, I.P. Code, for having fraudulently concealed a will of the deceased.²⁹ Where a person is on his trial on a charge of having given false evidence in a probate case, the judgment in the proceeding in which he is alleged to have given false evidence is not admissible in evidence against him.³⁰

Probate judgment is conclusive of the grounds of the decision against parties and privies on principles of res judicata.—As between parties and privies, not strangers, a probate judgment is also conclusive of the grounds of the decision where these have been put in issue and actually decided.³¹ This is not by reason of section 41 of the Evidence Act, but on the principle of res judicata enacted by section 11 of the C.P. Code. Thus, where, in opposition to an application for grant of probate by the executor named in the will, the widow of the testator pleaded that the will had been revoked by the testator shortly before his death and that he had given her authority to adopt, but the allegation not having been proved, probate was granted to the executor, the finding of the probate Court that the testator had not revoked the will and given no authority to the widow to adopt was held conclusive in a subsequent civil suit between the same parties.³² Similarly, a finding of the probate Court, in rejecting an application for probate, that the testator was not of sound disposing mind at the time of making the will operates as res judicata between the same parties in a subsequent litigation.³³ If matters in issue in a probate proceeding were the same as those in a subsequent suit, and if the points were formulated and a decree was passed in the probate case, the parties are bound to that extent and cannot reopen

24. Daropti v. Santi, 116 I.C. 452: 1929 L. 483; Annoda Charan Mondal v. Atul Chandra Malik, 54 I.C. 197: 34 C.L.J. 3; Komolochun Dutt v. Nilruttun Mundle, 4 C. 300.

25. R. v. Buttery, Rus. & Ry., 342; Phipson, Ev., 7th Ed., 419; see Taylor ss. 1680-81.

26. Manjanali Debi, etc. v. E., 4 C.W. N. clxxvi; Field, Ev., 8th Ed., 367.

27. Manjanali Debi, etc. v. E., 4 C.W. N. clxxvi.

28. See section 263, ill (iii), Act XXXIX of 1925; see also Daropti v.

Santi, 116 I.C. 452: 1929 L. 483.

29. Mali Muthu Servay v. E., 4 R. 251: 97 I.C. 1054: 1926 R. 202: 27 Cr. L.J. 1230.

30. Oates v. E., 76 I.C. 417: 1924 C. 104: 25 Cr. L.J. 177.

31. Phipson, Ev., 7th Ed., 395; Taylor, § 1673; see Spencer v. Williams, 40 L.J.P. 45.

32. Brendon v. Shrimant Sunderbai, 38 B. 272: 23 I.C. 221.

33. Kalyanchand Lalchand v. Sitabai Dhanasa, 38 B. 309: 23 I.C. 325 (F.B.).

the same questions in the subsequent suit. A judgment of a probate Court deciding that the plaintiffs are not the next reversioners to the estate of a person is *res judicata* in a subsequent suit for declaration that the plaintiffs are the next reversioners to the estate.³⁴

Probate judgment no evidence, in any case, not conclusive evidence either under section 41, Evidence Act, or section 11, C. P. Code, of matters only incidentally decided.—Though it be necessary, as a step to making a declaration which will operate *in rem*, to find a fact, that finding will not bind third parties in subsequent proceedings.³⁵ No judgment is evidence of the truth of any matter which is not directly decided or which is not a necessary ground of the decision; thus, it is never evidence of facts which merely came collaterally in question, or were incidentally cognizance, or can only be inferred by argument from the decision.³⁶ A finding not essential to the judgment in a probate action neither operates as a finding *in rem*,³⁷ nor is *res judicata* between the parties. Thus, a civil Court, in a suit for the construction of a will is competent to put upon it a construction different from the one incidentally put upon it by a probate Court in determining the question of the representative title of the applicant for letters of administration.³⁸ It is not the province of a probate Court to determine any question of title with reference to the property covered by the will,³⁹ or to inquire what disposing power the testator had over such property;⁴⁰ a probate is not, therefore, conclusive evidence of the fact that any given property is assets of the testator.⁴¹ A judgment of a probate Court cannot conclude a person as to his title in the estate.⁴² Where letters of administration have been granted to the defendant in preference to the plaintiff, the order granting the letters of administration is not a bar to the plaintiff bringing a suit for the purpose of determining any question of inheritance, or of the right to be appointed as *shebait*, the decree in which will supersede the grant.⁴³ A probate of the will is not primary evidence of any declaration as to pedigree contained in the will,⁴⁴ nor are letters of administration any evidence of the intestate's marriage.⁴⁵ A decision of a probate Court on a question of relationship does not operate as *res judicata* in a subsequent civil suit between the same parties.⁴⁶ Similarly, a decision of a probate Court on a question of status, e.g., that a woman is or is not the widow of the testator is not conclusive and can be reopened in a regular suit.⁴⁷

34. Ramanandan Prosad v. Sheo Parson Singh, 6 I.C. 301: 11 C.L.J. 623.

35. In the matter of Venkataramanayya Pantulu, 54 M. 601: 131 I.C. 817: 1931 M 441, (F.B.), per Stone, J.

36. Phipson, Ev., 7th Ed., 394.

37. Chandreswar Prosad Narain Singh v. Bisheshwar Pratap Narain Singh, 5 P. 777: 101 I.C. 289: 1927 P. 61.

38. Arunmoyi Dasi v. Mohendra Nath Wadadar, 20 C. 88; Thakurain Raj Rani v. Dwarkanath Singh, 223 I. C. 206.

39. In the matter of the goods of Saraswati Bala Devi, 23 I.C. 296: 17 C.W.N. 613; Chintaman Vyan-katarao Ghadge v. Ramchandra Vyankatrao Ghadge, 34 B. 589: 7

I.C. 944; Brij Nath De v. Chandar Mohan Banerji, 19 A. 458; Arunmoyi Dasi v. Mohendra Nath Wadadar, 20 C. 888.

40. Brij Nath De v. Chandar Mohan Banerji, 19 A. 458.

41. Re M'Kenna, 42 Ir L.T.R. 50; Phipson, Ev., 7th Ed., 419.

42. Arunmoyi Dasi v. Mohendra Nath Wadadar, 20 C. 888.

43. Jagannath Prasad Gupta v. Ranjit Singh, 25 C. 354.

44. Phipson, Ev., 7th Ed., 419.

45. Phipson, Ev., 7th Ed., 419.

46. Lalit Mohan Das v. Radha Raman Saha, 10 I.C. 434: 13 C.L.J. 547: 15 C.W.N. 1021.

47. Mi Ngwe Zan v. Mi Shwe Taik, 10 I.C. 897.

Probate and letters of administration are not conclusive, though they may perhaps be *prima facie* evidence of the death of the testator or intestate, or of his domicile.⁴⁸

Order refusing probate, whether conclusive?—It is doubtful whether an order refusing probate of a will is a judgment *in rem*; in some cases the order may operate as a judgment *in rem*, while in others it may clearly not be a conclusive adjudication *in rem*.⁴⁹ If the probate Court holds that the will is a forgery, or that it has not been duly executed by the testator with a sound disposing mind, or that it has not been duly attested, the judgment of the probate Court takes away from the executor named in the will the legal character of an executor, and from the legatees and beneficiaries their legal character of an executor, and from the legatees and beneficiaries their legal character and this result is final as against all persons interested under the will.⁵⁰ But every refusal to grant probate does not conclusively show that the will propounded is not the genuine will of the testator. The decision may be based upon entirely different grounds which do not touch the question of the genuineness of the will. Such a judgment cannot operate conclusively unless it embodied a final decision against the genuineness of the will.¹ A decision that, on the evidence produced in the case, the due execution of a will has not been proved cannot be treated as a final decision upon the genuineness or otherwise of the will and does not preclude a fresh application on the part of executors when they are in a position to support it with better proof.² If an application for probate by the executor has been dismissed for default, that fact itself cannot debar an application by any other person claiming an interest under the will or by the executor himself.³ The refusal to grant probate does not conclusively show that the will is not the genuine will of the testator and does not prevent the adjudication of the question in a subsequent proceeding; in other words, the judgment of a Court by which probate is refused does not necessarily operate as a judgment *in rem* in the same way as a judgment by which probate is granted.⁴ A finding of a probate Court that an attempted proof of a will has failed is not equivalent to a finding *in rem* and does not prevent the unsuccessful executor from

48. Phipson, *Ev.*, 7th Ed., 419.

49. See *Rama Naidu v. Rangavya Naidu*, 56 M. 346; 141 I.C. 227; 1933 M. 114.

50. *Phekni v. Manki*, 9 P. 698; 128 I.C. 128; 1930 P. 618; *Rallabandy Venkataratnam v. Yanamandra Satyavati*, 79 I.C. 44; 1924 M. 578; order of reference to F.B. by Beaman, J., in *Kalyanchand Lalchand v. Sitabai Dhanasa*, 38 B. 309; 23 I.C. 325; *Sarada Kanta Das v. Gobind Mohan Das*, 6 I.C. 912; 12 C.L.J. 91; contra F.B. decision in *Kalyanchand Lalchand v. Sitabai Dhanasa*, 38 B. 309; 23 I.C. 325. See also *Ramani Debi v. Kumud Bandhu Mukherjee*, 7 I.C. 126; 12 C.L.J. 185; *Chinasami v. Hariharabadra*, 16 M. 380.

1. *Ramani Debi v. Kumud Bandhu Mukherjee*, 7 I.C. 126; 12 C.L.J. 185.

2. *Ganesh Jagannath Dev. v. Ramchandra Ganesh Dev.* 21 B. 563; but see *Phekni v. Manki*, 9 P. 698; 128 I.C. 128; 1930 P. 618; *Schultz v. Schultz*, (1853) 10 Gattan 358; cited in *Ramani Debi v. Kumud Bandhu Mukherjee* 14 C.W.N. 924, where it was held that no fresh application for probate will lie if a previous application has been fairly rejected on the merits.

3. *Ramani Debi v. Kumud Bandhu Mukherjee*, 7 I.C. 126; 12 C.L.J. 185.

4. *Ramani Debi v. Kumud Bandhu Mukherjee*, 7 I.C. 126; 12 C.L.J. 185; 14 C.W.N. 924; *Ganesh Jagannath Dev. v. Ramchandra Ganesh Dev.* 21 B. 563; 2 N.L.R. 123; contra *Phekni v. Manki*, 9 P. 698; 128 I.C. 128; 1930 P. 618; *Chinasami v. Hariharabadra*, 16 M. 380.

setting up the unprobated will in answer to a claim made by an heir in a regular civil suit.⁵ Such a finding is not conclusive within the meaning of section 41. The only kind of negative judgment which is contemplated by section 41 is that which expressly takes away from a person a legal character which has, up to that time, subsisted;⁶ and a judgment refusing grant of probate is not a judgment which expressly takes away any subsisting legal character from the executor named in the will but is a judgment which merely refuses to recognize the legal character claimed by him. But though section 41 is not applicable to a judgment refusing probate, a finding by the probate Court that the testator was not of sound disposing mind when the alleged will was made would operate *res judicata* between the parties in subsequent proceedings.⁷ A finding as to the genuineness or otherwise of a will, arrived at in the course of guardianship proceedings cannot be pleaded as *res judicata* in the probate Court when an application for grant of probate is made.⁸

Probate judgment of foreign Court.—A judgment of a foreign Court granting probate of a will is conclusive evidence that the instrument proved was testamentary according to the law of that foreign country. It proves nothing else. The subsequent revocation of that probate by that Court proves no more than that the instrument before it was not testamentary according to the law of that place. Such a judgment cannot be treated as a judgment *in rem* so as to make it incumbent on a Court in India to hold that the deceased left no will or died intestate. A Court in India can still hold that the will left by the deceased is true, valid and binding in respect of the properties left by him in India, the devolution of which is governed by the law of India, and not by the law of the place where the owner of the properties resided and died.⁹

Matrimonial jurisdiction.—Courts in India are invested with matrimonial jurisdiction under various special enactments.¹⁰ In addition to the jurisdiction under these special Acts, an ordinary civil Court has, under the general law, jurisdiction to decide questions of matrimonial status between Hindus and Mohammedans according to their respective personal laws, but such adjudications are not judgments *in rem*. Thus, Where A, a non-Christian, gets an *ex parte* decree for restitution of conjugal rights against B, the decree will be binding between A and B, but a third person will not be bound by the decision, nor will such judgment be conclusive of marriage in proceedings between B and a third person.¹¹ A decree granted by a Court under section 42 of the Specific Relief Act

5. Kalyanchand Lalchand v. Sitabai Dhanasa, 38 B. 309: 23 I.C. 325 (F.B.).

6. Firm of Radhakishen v. Ganga-bai, 110 I.C. 730: 1928 S. 121; Kalyanchand Lalchand v. Sitabai Dhanasa, 38 B. 309: 23 I.C. 325 (F.B.).

7. Kalyanchand Lalchand v. Sitabai Dhanasa, 38 B. 309: 23 I.C. 325 (F.B.).

8. Chinasami v. Hariharabadra, 16 M. 380; Jerbanoo Rustomji Garda v. Pootlamai Manecksha Mehta, 1955 B. 447.

9. Fatima Kanni Ammal v. Sheikh Dawood, 1936 M. 197: 160 I.C. 733.

10. Act IV of 1869, (Indian Divorce Act); Act XV of 1872, (Indian Christian Marriages Act); Act XV of 1865 and Act XXXVIII of 1920, (Parsi Marriage and Divorce Act); Act XXI of 1866, (Native Converts' Marriage Dissolution Act); Act III of 1872 (Civil Marriage Act).

11. Ma Po Khin v. Ma Shin, 11 R. 198: 148 I.C. 67: 1933 R. 250; but see Kanhya Lal v. Radha Churn, 7 W.R. 338 (F.B.).

that the plaintiff in that suit was no longer the wife of the defendant is not a judgment passed in the exercise of matrimonial jurisdiction and is not, therefore, admissible as a judgment *in rem* under section 41 of the Evidence Act.¹²

Judgment of a Court of matrimonial jurisdiction conclusive against strangers on questions of status but not on grounds for the dissolution of marriage, etc.—The expression "legal character" when it has reference to a judgment of a Court of matrimonial jurisdiction means the status of widowhood or wifehood.¹³ Section 41 enacts that a final decree of a competent Court, in the exercise of matrimonial jurisdiction, which confers upon or takes away from any person any legal character not as against any specified person but absolutely, is relevant when the existence of any such legal character is relevant, and is conclusive proof that any legal character, which it takes away from any such person, ceased at the time from which such decree declares that it had ceased or should cease.¹⁴ Decrees by Courts of competent jurisdiction for the absolute dissolution of marriages are no doubt binding upon third parties. If a Court of competent jurisdiction decrees a divorce or sets aside a marriage between Mohammadans or Hindus, it puts an end to the relationship of husband and wife, and is binding upon all persons that, from the date of the decree the parties ceased to be husband and wife. This is not upon the principle that every one is presumed to have had notice of the suit, for, if they had notice, they could not intervene or interfere in the suit, but upon the principle that when a marriage is set aside by a Court of competent jurisdiction, it ceases to exist, not only so far as the parties are concerned, but as to all persons; a valid marriage causes the relationship of husband and wife, not only as between the parties to it, but also as respects all the world; a valid dissolution of a marriage, whether it be the act of the husband, as in the case of repudiation by a Mohammadan, or by the act of a Court competent to dissolve it, causes that relationship to cease as regards all the world.¹⁵ A judgment of a competent Court dissolving or annulling a marriage is conclusive proof of the fact that the relationship of husband and wife ceased from the date of the decree of dissolution,¹⁶ and, in the case of a decree of nullity, that the marriage was null and void.¹⁷ The judgment is conclusive that the parties are no longer husband and wife, but it is not conclusive, nor even *prima facie* evidence, against strangers that the cause for which the decree was pronounced existed.¹⁸ For instance, if a decree between A and B were granted upon the ground of the adultery of B with C, it would be conclusive as to the divorce, but it would not be even *prima facie* evidence against C that he was guilty of adultery with B, unless he were a party to the suit. So if a marriage between Mohammadans were set aside upon the ground of consanguinity or affinity, as, for instance, in the case of a Mohammadan, that the marriage was with the sister of another

12. *Muncherji Cursetji Khambata v. Jessie Grant Khambata*, 59 B. 278: 154 I.C. 1075: 1935 B. 5: 36 Bom. L.R. 1021; Cr. R. 1506 of 1934 (Lahore) decided on 22-2-1935.

13. *Mi Ngwe Zan v. Mi Shwe Taik*, 10 I.C. 987.

14. *Sita Devi v. Gopal Saran Narayan Singh*, 111 I.C. 762: 1928 P. 375.

15. *Kanhya Lal v. Radha Churn*, 7 W.

R. 338 (F.B.), per Peacock, C.J.

16. *Kanhya Lal v. Radha Churn*, 7 W. R. 338 (F.B.).

17. *Caston v. Caston*, 22 A. 270 (F.B.).

18. *Kanhya Lal v. Radha Churn*, 7 W. R. 338 (F.B.).

19. *Kanhya Lal v. Radha Churn*, 7 W. R. 338 (F.B.), per Peacock C.J., *Firm of Radhakishen v. Gangabai*, 110 I.C. 730: 1928 S. 121.

wife then living, the decree would be conclusive that the marriage had been set aside and that the relationship of husband and wife had ceased, if it ever existed; but it would be no evidence as against third parties, for example, in a question of inheritance, that the two ladies were sisters.¹⁹

Judgment under the Hindu Marriage Act is a judgment in rem.—A judgment by a District Judge in the exercise of the jurisdiction conferred upon him by the Hindu Marriage Act, 1955, falls within the purview of section 41 of the Indian Evidence Act, 1972, and the decision given in the exercise of such jurisdiction is conclusive not only against the parties to the proceeding but against the whole world i.e., such a judgment would operate as a judgment **in rem**.²⁰

A judgment in a maintenance suit cannot be impleaded as a bar to a petition under section 10 of the Hindu Marriage Act. But a judgment by a Judge in exercise of the jurisdiction conferred upon him by the Hindu Marriage Act falls within the purview of this section. Any decision given in the exercise of matrimonial jurisdiction is conclusive, not only against the parties to the proceeding but against the whole world. In other words, such judgments operate as judgments **in rem**. And a valid dissolution of marriage causes the relationship between the husband and the wife to cease to exist as against the whole world. Such a result cannot be achieved by a decision rendered by a Civil Court in a suit for maintenance.²¹

Judgments of foreign matrimonial Courts.—The English Courts do not recognize a foreign judgment of divorce as conclusive if the parties are English subjects and the marriage was solemnised in England;²² but if the parties were domiciled in the foreign country, the judgment will be recognized.²³ A similar rule has been assumed to prevail in India.²⁴ Of course, in England, as in this country, a foreign judgment is liable to impeachment on the ground of fraud, collusion or want of jurisdiction.²⁵

Judgment of a matrimonial Court annulling marriage, whether conclusive on a charge of bigamy?—In England, a judgment of a matrimonial Court annulling marriage is not conclusive in a prosecution for bigamy,²⁶ but this rule does not seem to be applicable in India.²⁷

Admiralty jurisdiction.—Admiralty jurisdiction is conferred on the High Courts in India by their respective Letters Patent, and on civil Courts of unlimited jurisdiction in the mofussil by the Colonial Courts of Admiralty Act, 1890.²⁸ It is with reference to vessels condemned as prizes more especially that questions concerned with admiralty jurisdic-

20. Suhas Manohar v. Manohar Shamrao, 74 Bom. L.R. 414.

21. Siddaiah v. Penchalamma, (1962) 2 Andhra W.R. 259.

22. Briggs v. Briggs, (1880) 5 P.D. 163.

23. Phipson, Ev., 7th Ed., 395; Bate v. B., (1906) P. 209; Harvey v. Farnie (1880) 5 P. 153.

24. See Sita Devi v. Gopal Saran Narayan Singh, 111 I.C. 762: 1928 P. 375.

25. See Section 44; section 13, C.P.C.,

Sita Devi v. Gopal Saran Narayan Singh, 111 I.C. 762: 1928 P. 375; The conflict of Laws by Dicey & Keith, 3rd Ed., 436.

26. R. v. Duchess of Kingston, 20 How. St. Tr. 355.

27. See Field, Ev., 8th Ed., 367; Woodroffe, Ev., 9th Ed., 419; Manjani Devi, etc. v. E., 4 C.W.N. clxxvi.

28. 53 & 54 Vict., c. 27; In re "Falls of Ettrick", 22 C. 511.

tion arise.²⁹ Adjudication as to prize in the Admiralty Court,³⁰ or for the enforcement of maritime lien,³¹ are judgments in rem,³² and, therefore conclusive against the whole world. The decision of an Admiralty Court restoring the certificate of an officer of a ship which had been suspended is a judgment in rem so far as the status and certificate of that officer is concerned; but the decision is not binding on a person who was not a party to that suit.³³

Scope of Section 41. Insolvency judgments.—A Judgment is conclusive proof, as against persons and privies, of facts directly in issue in the case, actually decided by the Court, and appearing from the judgment itself to be the ground on which it was based. But there are certain exceptions to this general rule and the provisions contained in section 41 are by way of exceptions. This section consists of two parts. The first one makes certain judgments, orders or decrees relevant, and the second one makes those judgments conclusive evidence in certain matters. In order that a judgment should come within the purview of section 41, it must be (1) of a competent Court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction and (2) it must (a) confer upon or take away from any person any legal character, or (b) declare any person to be entitled to any such character, or (c) to be entitled to any specific thing, not as against any specified person but absolutely. Under section 4(2) of the Provincial Insolvency Act a decision of an Insolvency Court is final between a debtor and the debtor's estate on the one hand and all claimants against him or it and all persons claiming through or under them or any of them on the other hand. Thus a decision is not binding on the plaintiffs who were not debtors or claimants as against the debtors inasmuch as they were not parties to the insolvency case or the appeal arising therefrom. Section 4(2) of the Act is not at all attracted to the case.³⁴

Insolvency jurisdiction; order of adjudication as insolvent, etc.—Insolvency jurisdiction is exercised by the Indian High Courts under their respective Letters Patent as well as under the Presidency Towns Insolvency Act,³⁵ and by the mofussil Courts under the Provincial Insolvency Act.³⁶ A judgment of an insolvency Court, subject to any objection under section 44 of the Evidence Act has both under section 41 of the Evidence Act and section 4(2) of the Provincial Insolvency Act³⁷ conclusive operation. An order adjudicating a person insolvent and vesting his property in the Official Receiver operates as a judgment in rem³⁸ and is conclusive against the whole world. But the finding on which it is based is not binding on third parties in subsequent proceedings.³⁹ If a creditor opposes his debtor's application to be declared an insolvent, on the ground that the debtor has made a fraudulent transfer of his property, but the insolvency Court, after hearing the creditor, declares the debtor insolvent, the insolvency Court will be presumed to have held that there

29. Field, Ev., 8th Ed., 366-367; for an Admiralty case in India, see *In re "Falls of Ettrick"*, 22 C. 511.

30. *Le Caux v. Eden*, 2 Doug. 612.

31. *The City of Mecca*, 5 P.D. 28.

32. Phipson, Ev., 7th Ed., 396.

33. *Yoofaf Sagar Abdulla v. S. S. Ellora*, 1939 S. 349.

34. *Ripumadhusudan Prasad v. Rama Shankar*, 1969 B.L.J.R. 544: 1969

Pat. L.J.R. 343.

35. Act III of 1909.

36. Act V of 1920.

37. Act V of 1920.

38. *Firm of Radhakishen v. Ganga-bai*, 110 I.C. 730: 1928 S. 121.

39. *D. G. Sahasrabudhe v. Kilachand Deochand and Co.*, 1947 N. 161: 230 I.C. 195: I.L.R. 1947 N. 85 (F.B.).

was no fraudulent transfer and the creditor will not be permitted to raise in a subsequent suit the plea that the transfer was fraudulent.⁴⁰ In such a case, the estoppel against the creditor is not limited to the provisions of section 41 of the Evidence Act, as the judgment of the insolvency Court being a judgment *inter partes* is conclusive against the creditor on principles of *res judicata* even if it be not a judgment *in rem* of the kind mentioned in section 41 of the Evidence Act.⁴¹ And the same will be the result if the creditor has sought for an order of adjudication against the debtor on the ground that he has made a fraudulent transfer of property but the insolvency Court has refused to make the order on the ground that no fraudulent transfer has been proved.⁴² Where in an order of adjudication a transfer has been found to be fraudulent and therefore an act, of insolvency, the finding under section 116 of the Presidency Towns Insolvency Act, is conclusive against the transferee even though it was passed in his absence and without notice to him.⁴³ The rule is, however, otherwise in the case of adjudications under the Provincial Insolvency Act.⁴⁴ The judgment of an insolvency Court declaring a person creditor of the insolvent does not confer any "legal character" on him within the meaning of section 41; hence, the declaration does not operate as a judgment *in rem*. A judgment in insolvency declaring that a judgment debt is a provable debt does not declare that an alleged debt which merged in that judgment debt is proved.⁴⁵ If the insolvency Court refuses to set aside an execution sale on the application of the receiver, the order is conclusive and no similar application by the insolvent is competent.⁴⁶

Adjudication by insolvency Court as to a person's title to property seized by the Court is conclusive.—If a person lays claim to the property seized by the insolvency Court as belonging to the insolvent, and such claim is adjudicated upon and negatived by the insolvency Court, the decision is conclusive against the claimant who is thereby precluded from bringing a civil suit.⁴⁷ In such circumstances, the decision of the insolvency Court amounts to conclusive proof as to title in respect of the specific property claimed by the applicant, not merely as against him but absolutely within the meaning of section 41.⁴⁸

Order refusing to declare a person insolvent is not a judgment in rem; decision of insolvency Court that a person is or is not member of a firm not conclusive inter omnes.—The only kind of negative judgment which is contemplated by section 41 is that which expressly takes away

40. Narayan v. Hardattarai, 57 I.C. 612; Ram Narain v. Durga Dat, 55 P.R. 1912: 13 I.C. 568.

41. Narayan v. Hardattarai, 57 I.C. 612; Ram Narain v. Durga Dat, 55 P.R. 1912: 13 I.C. 568.

42. Narayan v. Hardattarai, 57 I.C. 612.

43. Mahomed Siddique Yousuf v. Official Assignee of Calcutta, 1943 P. C. 130: 70 I.A. 93.

44. Official Receiver v. Narra Gopala krishniah, 1945 M. 66: 218 I.C. 240: I.L.R. 1945 M. 541 (F.B.).

45. In the matter of Venkataramanayya Pantulu, 54 M. 601: 131 I.C. 817: 1931 M. 441.

46. Bansi Ram v. Anandi Ram Mohan, 1935 P. 273: 155 I.C. 734.

47. Bhairo Prasad v. Dass, 51 I.C. 113; Irshad Husain v. Gopi Nath, 41 A. 378: 49 I.C. 590; Pitaram v. Jhujhar Singh, 33 I.C. 798.

48. Pitaram v. Jhujhar Singh, 33 I.C. 798; this observation which is obiter, it is submitted, is incorrect, as in the circumstances mentioned the estoppel arises by *res judicata* and not by reason of section 41, Evidence Act, and, therefore, though parties and privies are within the estoppel, strangers are not. See Ram Narain v. Durga Dat, 55 P.R. 1912: 13 I.C. 568.

from a person a legal character which has up to that time subsisted;⁴⁹ an order refusing to declare a person insolvent is not a negative judgment of this kind, inasmuch as it does not purport to take away from the debtor a legal character which up to that time subsisted.⁵⁰ The expression "legal character" must be narrowly construed. "Legal character" means something equivalent to status. The legal character assigned to a person announces to all the world what the legal status of the person in question is.¹ Being member of a firm is not a legal character at all of the kind mentioned in section 41, and any adjudication by the insolvency Court on the question whether a person is or is not member of an insolvent firm is neither relevant nor conclusive against strangers,² though it may be conclusive *inter partes* on the principle of *res judicata*. Further, as has been noticed before,³ as between strangers, or a party and a stranger, a judgment *in rem* is no evidence of the truth of the grounds of the decision;⁴ and, therefore, if an insolvency Court declines to declare a person insolvent on the ground that he is not a member of the firm adjudicated insolvent, the judgment of the insolvency Court is no evidence of the truth of this ground.⁵

Questions of title decided by an Insolvency Court act as *res judicata* in subsequent suits.⁶

Decision that a creditor has or has not proved his right to present the petition.—The question whether a petitioning creditor had proved his right to present the petition or not, which, *inter alia*, includes the question whether the debtor had committed an act of insolvency or not, is a question between the petitioning creditor and the alleged debtor. An order of the Court rejecting a petition on the ground that the petitioning creditor had not proved his right to present the petition would not operate as *res judicata* against the other creditor.⁷

Findings in an insolvency judgment, whether conclusive?—Though it may be necessary as a step to making a declaration which will operate *in rem*, to find a fact, that finding will not bind third parties in subsequent proceedings.⁸ See also notes under the heading "judgments *in rem* conclusive of matters actually decided".

So far as the effect of an order of adjudication is concerned, in view of the provisions of this section no one can challenge it except by way of an appeal under the Insolvency law. Once an order of adjudication has come to stay beyond challenge, it is not open to any person, in a subsequent proceeding in the insolvency, or otherwise, to challenge it.

49. Firm of Radhakishen v. Gangabai, 110 I.C. 730: 1928 S. 121; Kalyanchand Lalchand v. Sitabai Dhana-sa, 38 B. 309: 23 I.C. 325 (F.B.).

50. Firm of Radhakishen v. Gangabai, 110 I.C. 730: 1928 S. 121.

1. In the matter of Venkataramanayya Pantulu, 54 M. 601: 131 I.C. 817: 1931 M. 441.

2. Official Assignee of Madras v. Official Assignee of Rangoon, 83 I.C. 174: 1924 M. 662; Firm of Radhakishen v. Gangabai, 110 I.C. 730: 1928 S. 121; Punjab National Bank v. Balik Ram, 1940 C. 225.

3. See notes under the heading "judgments *in rem* conclusive of matters actually decided", *supra*;

4. Phipson, Ev., 7th Ed., 395; Taylor, § 1733-34.

5. Firm of Radhakishen v. Gangabai, 110 I.C. 730: 1928 S. 121.

6. 1962 Pak. L.I. Lah. 106.

7. Firm of Radhakishen v. Gangabai, 110 I.C. 730: 1928 S. 121.

8. In the matter of Venkataramanayya Pantulu, 54 M. 601: 131 I.C. 817: 1931 M. 441.

The mere fact that that status is determined, as a result of an application by a petitioning creditor, cannot give to anyone any right at a subsequent stage in the insolvency proceedings, to challenge the adjudication order. Such a challenge is prohibited by virtue of this section. Nobody, at subsequent stages of the proceedings can challenge the very order of adjudication of the debtor as an insolvent in the guise of throwing a challenge to the genuineness of the debt of the petitioning creditor.⁹

Legal character.—The adjudication of a person as an insolvent has the effect of taking away from that persons his legal character of being not insolvent. An order by which such adjudication is made is covered by this section.¹⁰

The section is exhaustive of judgments in rem: judgments on questions of adoption, legitimacy, etc., are not judgments in rem.—This section is exhaustive of the classes of judgments which have a conclusive operation. No judgment, except that passed by a Court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, can have the effect of a judgment in rem.¹¹ Therefore, a judgment deciding a question of adoption,¹² or declaring a person as a partner,¹³ is not a judgment in rem binding on strangers. But it has been held that a foreign judgment declaring that a person is the adopted son of a Hindu widow, though not a judgment in rem, is binding on the Courts in India in a suit relating to immovable property in India belonging to that widow.¹⁴ A decision by a competent Court that a Hindu family was joint and undivided, or upon a question of legitimacy, partibility of property, rule of a descent in a particular family, or upon any other question of the same nature in a suit *inter partes* is not a judgment in rem or binding upon strangers, i.e., persons neither parties to the suit nor privies.¹⁵ The decision of a Court acting under the Guardians and Wards Act as to the age of a minor is not a judgment in rem and, therefore, not conclusive, though it may be relevant to prove that the person was ward at the time.¹⁶ Orders passed in the guardianship proceedings cannot be treated as a judgment in rem. They are admissible only to prove that such an order had in fact been made, but not to prove their contents. Certified copies of such orders are not, therefore, available even as being judgments to prove the age of the minor.¹⁷ Where the father was not made

9. Bajirao v. Bansilal I.L.R. 1963 B. 173 65 Bom. L.R. 39.

10. Amar Kaur v. Shiv Karan, I.L.R. (1965) 1 Punj. 160.

11. Arjun v. Mathura Nath, 116 I.C. 83: 1928 A. 395; Guru Mahadeo Asram Prashad Sahi Bahadur v. Jagatraj Kuer, 71 I.C. 929: 1924 P. 298; Rahmat Ali Khan v. Bubu Zuhra, 14 P.R. 1912: 14 I.C. 486.

12. Appa Trimbak Deshpande v. Waman Govind Deshpande, 1941 P.C. 85; Arjun v. Mathura Nath, 116 I.C. 83: 1928 A. 395; Guru Mahadeo Asram Prashad Sahi Bahadur v. Jagatraj Kuer, 71 I.C. 929: 1924 P. 298; Kanhya Lal v. Radha Churn, 7 W.R. 338 (F.B.); Yara-

kamma v. Anakala Naramma, 2 M.H.C.R. 276.

13. Firm of Radhakishen v. Gangabai, 110 I.C. 730: 1928 S. 121; Abdurahiman Koyakutty Hajee v. Agastheenju Joseph, 1952 T.C. 176.

14. Natraja Pillai v. Subaraya Chettiar, 1939 M.W.N. 180: 1939 M. 693.

15. Yarakamma v. Anokala Naramma, 2 M.H.C.R. 276; Abdurahiman Koyakutty Hajee v. Agastheenju Joseph, 1952 T.C. 176.

16. Husaina v. Sahib Nur, 7 I.C. 505; see also Manicka Mudaliar v. Ammakannu, 1942 M. 129: 201 I.C. 39.

17. Muktipada Dawn v. Aklema Khatun, 1950 C. 533.

a party to the guardianship proceedings for the custody of his child, the orders passed in those proceedings are inadmissible under this section in a subsequent suit involving the issue of the parentage of the child.¹⁸ But an order may be conclusive otherwise than under the provisions of this section. Thus by reason of section 68 of the Guardians and Wards Act an order appointing a guardian cannot be called in question except by appeal or revision.¹⁹ An order upon a contributory under the Companies Act is conclusive evidence that the moneys ordered to be paid are due, and all other pertinent matters stated in such order are to be taken to be truly stated as against all persons and in all proceedings whatsoever.²⁰ An award made under the Bombay Agricultural Debtors' Relief Act is an award between the debtor and all his creditors and is therefore binding upon all the creditors. It is not a judgment *in rem*.²¹

Foreign judgments declaring status.—Judgments of foreign Courts which declare the status of persons domiciled within their territory are by the comity of nations treated in India as analogous to judgments *in rem*.²²

Foreign Judgments.—Conclusiveness from the point of view of the Law of Evidence can attach to a judgment, order or decree, only if it falls within the category mentioned in this section. In considering the question, whether a judgment of a foreign Court is conclusive, the Court will not enquire whether conclusions recorded thereby are supported by the evidence, or are otherwise correct because the binding character of the judgment can be displaced only by establishing that the case falls within one or more of the six clauses of section 13 C.P.C., and not otherwise.²³

Orders in lunacy proceedings.—See notes to section 13 under this heading.

42. Judgments, orders or decrees other than those mentioned in section 41 are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees other than those are not conclusive proof of that which they mentioned in section 41.

Illustration

A sues B for trespass on his land. B alleges the existence of a public right of way over the land, which A denies.

The existence of the decree in favour of a defendant, in a suit by A against C for a trespass on the same land, in which C alleged the exist-

18. *Manicka Mudaliar v. Ammakannu*, 1942 M. 129: 201 I.C. 39.

19. *Sankhavaram Naligindla Venkata Rangacharyulu v. Rangasubbe Akappa Rao*, 1941 M. 569.

20. Woodroffe, Ev., 9th Ed., 419; section 198, Act VII of 1913.

21. *Keshav Ganashyam v. Waman Rangaji*, 1953 B. 340.

22. *Nataraja Pillai v. Subbaraya Chettiar*, 1939 M.W.N. 180: 1939 M. 693.

23. *Viswanatham v. Abdul Wajid*, (1983) 3 S.C.R. 22.

ence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.

COMMENTARY

Principle.—As has been noticed in the notes to the preceding section,²⁴ the general rule is that a person is not affected by a judgment passed in a litigation to which he was no party. *Res inter alios judicata nullum inter alios prejudicium facit.*²⁵ To this general rule, judgments *in rem* which are the subject of the preceding section form the first, and judgments relating to matters of a public nature with which the present section deals, the second exception.²⁶ This is on the principle that “in matters of public right the new party to the second proceeding, as one of the public, has been virtually a party to the former proceeding and, therefore, he is properly excused”.²⁷ Such judgments are sometimes regarded as a species of judgments *in rem*,²⁸ but are more usually considered as in the nature of, though stronger than, reputation.²⁹

Two things must be borne in mind in regard to the provisions of this section. Firstly, the judgment must relate to a matter of a public nature,³⁰ and secondly, the judgment, when admitted in evidence as satisfying the first requirement, is not like a judgment admitted under section 40 or section 41, conclusive.³¹

Matters of a public nature.—The expression “matters of a public nature” means subject of public or general nature and thus includes public rights or customs,³² as well as general rights and customs,³³ if there be any distinction, as there is in England, between “public” and “general” rights and customs.³⁴

Judgments on questions of custom or usage.—The question what is the custom in a particular matter in a locality or a class of people or perhaps a family is a question of public nature, and judgments as to the existence or non-existence of the custom would be relevant both under section 13 and this section.³⁵ A judgment by which the existence of a custom or usage is recognized is admissible under section 42.³⁶

Report is not a judgment.—The report embodying the findings as to causes of the accident of an aircraft made by an authority designated in

24. See notes to section 41 under the heading “judgments in personam and judgments in rem”.

25. A matter adjudicated upon between one set of persons does not in any way prejudice another set of persons.

26. *Bai Baiji v. Bai Santok*, 20 B. 53.

27. *Gujju Lall v. Fatteh Lall*, 6 C. 171, 183 (F.B.), per Pontifex, J.

28. *Neil v. Devonshire*, 8 App. Cas., 147.

29. *Stark.*, (4th Ed.), 386; *Phipson*, Ev., 7th Ed., 413.

30. *Gujju Lall v. Fatteh Lall*, 6 C. 171 (F.B.).

31. *Gujju Lal v. Fatteh Lal*, 6 C. 171 (F.B.).

32. See section 32 (4).

33. See section 48; *Woodroffe*, Ev., 9th Ed., 423; *Bunyad Ali v. Faiz Muhammad*, 173 P.R. 1889.

34. “Public rights” are those common to all members of the State: “general rights” are those affecting any considerable section of the community, *Phipson*, Ev., 7th Ed., 285; see notes to section 32 (4) under the heading “public right or custom or matter of public or general interest”.

35. See notes to section 13.

36. *Raghunath v. Rampartab Ramchander*, 1935 S. 38; *Sher Mohamad v. Jawahar Khatun*, (1938) 40 P.L.R. 29; *Ram Kishore Jaiswal v. B. Kavindra Narain*, 1955 A. 59 (F.B.).

Rule 75 of the Aircraft Rules as a Court, which is not a judgment or a decree; such a report is not admissible as a judgment under this section, though it is admissible under section 35 of the Act.³⁷

Judicial decisions on questions of customs are relevant: compromise judgments admissible.—It has already been noticed that the existence of a public or general custom is a matter of a public nature. Customs of particular communities also are matters of a public interest³⁸ and, therefore, where a custom alleged to be followed by any particular class of people is in dispute, judicial decisions in which such custom has been recognized to exist are good evidence of the existence of that custom.³⁹ Decisions on questions of local custom or usage also are relevant.⁴⁰ The most cogent evidence of a custom is a final decree based on that custom.⁴¹ It ought to appear clearly from the previous judgment that the question of custom was determined.⁴² A judgment becomes relevant under this section by reason of its containing an adjudication on a matter of a public nature and, therefore, the fact that a judgment becomes relevant under this section would not render remarks made in it incidentally about other matters admissible in evidence in a subsequent suit.⁴³ So far as the question of mere admissibility of a judgment under this section is concerned, it is immaterial that the judgment has been suffered by default; or is not supported by any proof of execution; or was pronounced after the commencement of controversy as to that custom, the conditions of *lis mota* not applying to such judgments;⁴⁴ or was based on a compromise,⁴⁵ or was passed in *ex parte* proceedings.⁴⁶ But the evidentiary value of a judgment based on a compromise or confession is very much less than that of a judgment in which a custom was held proved or negated after contest.⁴⁷

Other instances of matters of a public nature, judgments regarding which have been held admissible.—The question what is the caste of a particular family⁴⁸ or what is the customary length of a hath in a parti-

37. *Madhuri v. I.A. Corporation*, A.I. R. 1962 C. 544.
38. *Bai Baiji v. Bai Santok*, 20 B. 53; *Bunyad Ali v. Faiz Muhammad*, 173 P.R. 1889.
39. *Suganchand Bhikamchand v. Mangibai Gulabchand*, 1942 B. 185; *Harnabh Pershad v. Mandil Das*, 27 C. 379; *Bai Baiji v. Bai Santok*, 20 B. 53; *Shimbu Nath v. Gayan Chand*, 16 A. 379; *Bunyad Ali v. Faiz Muhammad*, 173 R. 1889.
40. *Easwara Doss v. Phungavanachari*, 13 M. 361; *Gurdayal Mal v. Jhandu Mal*, 10 A. 585.
41. *Gurdayal Mal v. Jhandu Mal*, 10 A. 585; *Lachman Rai v. Akbar Khan*, I.A. 440; *Barkat Ullah v. Zulfiqar Ali Shah*, P.L.D. 1949 L. 193.
42. *Woodroffe, Ev.*, 9th Ed., 424, citing 2 Agra, 120, 121 (1867).
43. *Banwari Lal v. Sheo Chand*, 85 I.C. 795: 1923 L. 384; see *Basi Nath Pal v. Jagat Kishore Acharjee Chowdhury*, 35 I.C. 298: 23 C.L.J. 583.
44. See *Woodroffe, Ev.*, 4th Ed., 425: *Taylor*, § 624.
45. *Lekh Raj v. Inder Mal*, 4 L. 176: 73 I.C. 658: 1924 L. 161; *Imperial Oil, Soap & General Mills Co., Ltd., Delhi v. Misbahuddin*, 2 L. 83—61 I.C. 325: 1921 L. 69; *Abdul Karim v. Shiv Narain*, 1952 Punj. 356: 1952 P.L.R. 255.
46. *Abdul Karim v. Shiv Narain*, 1952 Punj. 356: 1952 P.L.R. 255.
47. *Lekh Raj v. Inder Mal*, 4 L. 176: 73 I.C. 658: 1924 L. 161; *Imperial Oil, Soap & General Mills Co., Ltd., Delhi v. Misbahuddin*, 2 L. 83: 61 I.C. 325: 1921 L. 69; *Mahadeo v. Bakshwar Prasad*, 1939 A. 626: 1939 A.L.J. 708.
48. *Maharaja of Kothapur v. Sundaram Iyer*, 48 M. 1: 93 I.C. 705: 1025 M. 497.

cular **purgunna**,⁴⁹ is a question relating to matters of a public nature, and previous judgments on such matters, though not **inter partes**, are relevant under this section. Where the question is whether the occupancy tenants of a certain village are entitled to sell their holdings under certain circumstances, judgments, not **inter partes**, recognizing the right of the occupancy tenants of adjoining villages of the same **purgunna** holding similar tenures are admissible.⁵⁰ A judgment in a suit under section 92 of the Code of Civil Procedure is not a judgment **in rem**.¹ A previous judgment, not **inter partes**, holding certain property to be a trust property dedicated to religious and charitable purposes, is relevant in a subsequent suit in proof of the nature of the property.² A judgment holding a place to be a **takia** is admissible under this section.³ In a suit brought by the trustees of a temple to recover from the owners of certain lands in certain villages money claimed under an alleged right as due to the temple, judgments in other suits against other persons in which claims under the same right had been decreed in favour of the trustees of the temple were held relevant both under section 13 and the present section.⁴ A judgment as to what is the custom of adoption in a particular caste or tribe,⁵ or as to the status of a class as **ala maliks**⁶ is admissible.

Matters not held to be of a public nature.—A trial for murder is not a matter in which the public at large are interested; the morbid interest of a section of the public in the details of a murder trial cannot constitute such trial a matter of public nature. Therefore, the judgment of a criminal Court convicting the defendant of murder is not admissible against the defendant in a suit for compensation under Act III of 1855 brought against him by the son of the deceased.⁷ Where, in a suit for injunction against him, the defendant, in order to show that there was no patent in existence for the watches which bore a certain trade mark, gave in evidence a certified copy of the judgment of a Swiss Court, given in a litigation to which the plaintiff was no party, the judgment was held inadmissible under this section.⁸

Coroner's Inquisition.—A coroner's inquisition is not a judgment and is not relevant under this section.⁹ ..

Only appellate judgment must be produced.—See note to section 13 under this heading.

49. Jainutullah Sirdar v. Romoni Kant Roy, 15 C. 233. The previous judgment on this matter was admitted under section 13, but, as remarked in Woodroffe, Ev., 9th Ed., 183, the judgment was equally admissible under section 42.

50. Dalglish v. Guzuffer Hassain, 23 C. 427.

1. Anjuman Islarnia v. Latafat Ali, 1950 A. 109: 1950 A.L.J. 776; but see Sunni Central Board v. Sirajul Haq Khan, 1954 A. 88.

2. Misbahuddin v. Vidya Sagar, 156 I.C. 268: 1935 L. 64: 46 P.L.R. 106; Ganesh Dharnidhar Maharaj-

dev v. Keshavarav Govind Kulgavkar, 15 B. 625, 635.

3. Imam Bibi v. Abdur Rahman, 1936 L. 929: 163 I.C. 924.

4. Ramasami v. Appavu, 12 M. 9.

5. Sundrabai Hanmantrao Kulkarni v. Hanmant Gurunath Kulkarni, 56 B. 298: 140 I.C. 235: 1932 B. 398.

6. Sardar Khan v. Sadulla Khan, 140 I.C. 566: 1933 L. 57.

7. Bishen Das v. Ram Labhaya, 106 P.R. 1915: 32 I.C. 18.

8. Heinger v. Droz, 25 B. 433.

9. E. v. Bhagwandas Tulsidas, 47 Bom. L.R. 997: 1946 B. 184.

43. Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of this Act.

Illustrations

(a) A and B separately sue C for a libel which reflects upon each of them. C in each case says that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither.

A obtains a decree against C for damages on the ground that C failed to make out his justification. The fact is irrelevant as between B and C.

(b) A prosecutes B for adultery with C, A's wife.

B denies that C is A's wife, but the Court convicts B of adultery.

Afterwards, C is prosecuted for bigamy in marrying B during A's life-time. C says that she never was A's wife.

The judgment against B is irrelevant as against C.

(c) A prosecutes B for stealing a cow from him. B is convicted.

A afterwards sues C for the cow, which B had sold to him before his conviction. As between A and C, the judgment against B is irrelevant.

(d) A has obtained a decree for the possession of land against B. C, B's son, murders A in consequence.

The existence of the judgment is relevant, as showing motive for a crime.

¹⁰[(e) A is charged with theft and with having been previously convicted of theft. The previous conviction is relevant as a fact in issue.

(f) A is tried for the murder of B. The fact that B prosecuted A for libel and that A was convicted and sentenced is relevant under section 8, as showing the motive for the fact in issue].

COMMENTARY

Principle.—This section enacts the general rule, to which the two preceding sections are exceptions, that a judgment, not *inter partes*, is not relevant as a judgment, i.e., as proof of the particular point decided by it. "If there is one rule of law", says Chief Justice Garth, "which is better known and approved than another, as being founded upon the most manifest justice and good sense it is this: that (except in the case of judgments *in rem* and judgments relating to matters of a public nature, which are governed by a different principle) no man ought to be bound by the decision of a Court of Justice, unless he or those under whom he

10. Inserted by the Indian Evidence Act (1872) Amendment Act 1891

(3 of 1891) S. 5.

claims were parties to the proceedings in which it was given".¹¹ The section is based on the maxim "*res inter alios judicata nullum inter alios prejudicium facit*",¹² which being founded on principles of natural justice has been known to the civil law from the earliest times. "A transaction between two parties in judicial proceedings ought not to be binding upon a third, for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment which he might think erroneous".¹³

A judgment, not *inter partes*, is conclusive evidence against strangers of its existence, date and legal consequences as distinguished from its truth.—The law attributes unerring verity to the substantive as opposed to the judicial portions of the record. All judgments are conclusive of their existence as distinguished from their truth; so every judgment is conclusive evidence for or against all persons, whether parties, privies or strangers, of its own existence, date and legal effect as distinguished from the accuracy of the decision rendered.¹⁴ If the object is merely to prove the existence of the judgment, its date or legal consequences, the production of the record or a certified copy is conclusive evidence of the facts against the whole world, the reason being that a judgment as a public transaction of a solemn nature must be presumed to be faithfully recorded.¹⁵ A judgment can legitimately be used to explain the history of the case or to explain or introduce facts in issue.¹⁶ A statement of facts in a previous judgment cannot be used as evidence in a subsequent case to decide points arising in that case.¹⁷

A judgment in another suit which is not *inter partes* may be evidence for certain purposes, viz. to prove the fact of the judgment; to show who the parties to the suit were; to show what was the subject matter of the suit; to show what was decided or declared by the judgment; to show what documents had been filed by the parties in the proceeding to establish the transaction referred to in the judgment; as evidence to show the conduct of the parties or particular instances of the exercise of a right or assertion of a title; or to identify property; or to show how property had been previously dealt with; to establish a particular transaction in which a right is asserted and the name of the person, if any, who is declared in the judgment as entitled to possession; but the judgment is not evidence to establish the truth of the matter decided in that judgment. The findings of fact arrived at on the evidence in one case are not evidence of that fact in another case.¹⁸

11. *Gujju Lal v. Fatteh Lal*, 6 C. 171 189 (F.B.).

12. A matter adjudicated upon between one set of persons does not in any way prejudice another set of persons.

13. Per DeGrey, C.J., in the *Duchess of Kingston's Case*, 20 How. St Tr. 355.

14. Phipson. Ev., 7th Ed., 412; *Indra Singh v. Commissioner of Income-tax*, 22 P. 55: 1943 P. 169; *Trailokyanath Das v. E.*, 59 C. 136: 137 I.C. 163: 1932 C. 293: 33 Cr. L.J. 441; *Gopi Sundari Dasi v. Kherod*

Gobinda Chowdhury, 82 I.C. 99: 1925 C. 194; *Basi Nath Pal v. Jagat Kishore Acharjee Chowdhury*, 35 I.C. 298: 23 C.L.J. 583; *Muneswari v. Jugal Mohini Dasi*, 1952 C. 368.

15. *Abinash Chandra v. Paresh Nath Ghose, etc.*, 9 C.W.N. 402, 410; Taylor, § 1667.

16. *Purnima Debya v. Nand Lal Ojha*, 11 P. 50: 136 I.C. 577: 1932 P. 105.

17. *Khub Narain Missir v. Ramchandra Narain Dass*, 1951 P. 340: 28 P. 890.

18. *Ramji Batanji v. Manohar*, 62 Bom. L.R. 322.

Admissibility of judgment not inter partes.—Judgment of conviction by a Magistrate though admissible in civil proceeding to prove the fact of conviction of accused in that case, is not strictly admissible to prove the facts constituting the offence, in another case, in which the party against whom the judgment in the criminal case was sought to be admitted was not a party to the criminal case.¹⁹

Judgment not inter partes—Redemption suit—Evidentiary value of previous decisions.—Where a suit is brought for possession by way of redemption by plaintiffs as heirs of deceased mortgagor, they in order to establish their right to redeem, are entitled to produce a copy of judgment given in another suit and an order in mutation proceedings whereunder plaintiffs' right to succeed to the estate of the deceased mortgagor is recognised. The order in the mutation proceedings and the judgment are relevant under sections 13 and 43 and their probative value is very high. It is not necessary for the plaintiffs to prove that the order and the judgment had been correctly passed. The fact that the order and the judgment have not been challenged or set aside in any proceedings, goes to prove that they were correctly made.²⁰

A judgment not inter partes, not being a judgment in rem or relating to matters of a public nature, is irrelevant, but the existence of such judgment may become relevant under some other section of the Act.—The language of the present and the three preceding sections must be carefully examined and compared. What is relevant under section 40 is the existence of a judgment which by law prevents the Court from taking cognizance of a suit or holding a trial. Therefore, a judgment is admitted under section 40 not as proof of the point decided by it but to support the plea that no inquiry can be made on the point determined by the previous judgment, the existence of the previous judgment barring such enquiry. The point decided by the previous judgment being *res judicata*, no question of proving that point arises; hence the relevant fact is not the judgment as such but the existence of the judgment. In sections 41 and 42, however, the relevant fact is not the existence of the judgment but the judgment itself, and under these two sections the judgment is admitted in evidence as conclusive,²¹ or *prima facie* proof²² of the point determined by the judgment. Section 43 contains two rules, one declaring that a judgment which is not relevant under the three preceding sections is irrelevant, and the other declaring that the existence of a judgment, which is not relevant under the three preceding sections, may become relevant under some other section of the Act. Thus, the fact declared irrelevant by section 43 is a judgment as a judgment; whereas the fact, the relevancy of which is contemplated as possible under some other section of the Act, is the existence of a judgment. Therefore, when a judgment is introduced in evidence under the latter part of section 43, it is admitted for the purpose of proving its existence and not for the purpose of proving the point decided by it.²³ A former

19. *Caitan D'Souza v. Miss Jerbai S.C.* Dinshaw, 73 Bom. L.R. 418.

20. *Hiralal v. Shivalal* (1969) 71 Punj. L.R. 735.

21. Section 41.

22. Section 42.

23. *Hitendra Singh v. Rameshwar Singh Bahadur*, 4 P. 510: 88 I.C. 141 & 87 I.C. 849: 1925 P. 625 & 667; *Secretary of State v. Ahmed*

Badsha Sahib, 44 M. 778: 67 I.C. 971: 1921 M. 248 (F.B.); *Tripurana Seethapati Rao Dora v. Rokham Venkanna Dora*, 45 M. 332: 66 I.C. 280: 1922 M. 71 (F.B.); *Mohammad Amin Valad v. Hasan Valad*, 31 B. 143; *Collector of Gorakhpur v. Palakdhari Singh*, 12 A.I. (F.B.); *Gujju Lall v. Fatteh Lall*, 6 C. 171 (F.B.).

judgment not *inter partes*, which is not a judgment *in rem* nor one relating to matters of a public nature, is not admissible in evidence in a subsequent suit, either as *res judicata* or as proof of the particular point which it decides. If a judgment is not admissible under section 40 or section 41 or section 42, it is not admissible at all in its special character of a judgment and, when a judgment is admitted under the latter part of section 43 read with some other section of the Act, it can only be used to prove the fact that there has been a decision on a particular point and not to prove the particular point on which there has been a decision.²⁴ As has already been observed, the real question when a judgment is sought to be introduced under the provisions of section 43 is "Is the existence of the judgment a fact in issue or relevant under some section of the Act"?²⁵ It is not the correctness of the previous decision but the fact that there has been a decision that is established by the production of the judgment.²⁶ Section 43 excludes all judgments in a former suit as irrelevant if they are not *inter partes*, unless the existence of such judgment is a fact in issue or is relevant under some other provision of the Act. The existence of a judgment may be relevant but the truth of it, by which is understood the decision of the Judge and the opinion expressed by him, is not relevant. It may be relevant to show that a certain circumstance existed at the time when the judgment was delivered; for instance, it may show that the witnesses in the previous suit made contradictory statements; or it may be relevant to show the nature and the character of the claim in the previous suit.²⁷ But it cannot be used to prove the conclusion arrived at by the Judge on the particular evidence before him in the previous suit.²⁸ See notes to section 13.

Instances of the existence of a judgment becoming a fact in issue or a relevant fact.—It will naturally be asked what are those cases in which the existence of a judgment as distinguished from the correctness of the decision embodied therein become a fact in issue or a relevant fact. "The cases so contemplated by section 43 are those where a judgment is used not as *res judicata* or as evidence more or less binding upon an opponent by reason of the adjudication which it contains, because judgments of that kind had already been dealt with under one or other of the immediately preceding sections. But the cases referred to in section 43 are such, I conceive as the section itself illustrates, viz., when the fact of any particular judgment having been given is a matter to be proved in the case. As, for instance, if A sued B for slander, in saying that he had been convicted of forgery, and B justified upon the ground that the alleged slander was true, the conviction of A for forgery, would be a fact to be proved by B like any other fact in the case, and quite irrespective of whether A had been actually guilty of the forgery or not. This, I conceive, would be one of the many cases alluded to in section

24. *Gujju Lall v. Fatteh Lall*, 6 C. 171 (F.B.).

25. *Babui Shamsunder Kuer v. Ramkhelawan Sah*, 8 P. 763; 121 I.C. 334; 1929 P. 739; *Hitendra Singh v. Rameswar Singh Bahadur*, 4 P. 510; 88 I.C. 141 & 87 I.C. 849; 1925 P. 625 & 667; *Basi Nath Pal v. Jagat Kisore Acharjee Chowdhury*, 35 I.C. 298; 23 C.L.J. 583; *Collector of Gorakhpur v. Palakdhari Singh*, 12 A. 1 (F.B.); see also *Asa*

Singh v. Mansha Ram, 121 I.C. 509; 1930 L. 237.

26. *Baidya Nath Dutt v. Alef Jan Bibi*, 70 I.C. 294; 1923 C. 240.

27. *Benode Lal Chakravarty v. Secretary of State*, 133 I.C. 573; 1931 C. 239.

28. *Ramparekha Pande v. Ramihari Kuer*, 149 I.C. 1158; 1933 P. 690; *Benode Lal Chakravarty v. Secretary of State*, 133 I.C. 573; 1931 C. 239.

43²⁹. If a person is charged with theft and is also liable to enhanced punishment under section 75, I.P. Code, by reason of having previously been convicted, the judgment of previous conviction would be a fact in issue and thus admissible under section 43.³⁰ If A is tried for the murder of B, the fact that B prosecuted A for libel and that A was convicted and sentenced is relevant under section 8, as showing the motive for the fact in issue.³¹ Where the question is whether the plaintiff and his family were on good terms, it is a relevant fact to show by a judgment that the plaintiff was attacked and seriously injured and that he charged his own brother with having taken part in the fight and that the brother was convicted.³² Where the fact in issue is whether a transaction is *benami*, a judgment which affords motive for the *benami*, though not *inter partes*, is relevant.³³ If A has obtained a decree for the possession of land against B, and C, B's son, murders A in consequence, the existence of the judgment is relevant as showing the motive for the crime.³⁴ In a suit for malicious prosecution the judgment in the criminal proceeding is evidence to establish the fact of acquittal, the fact, namely, that the criminal proceeding terminated in favour of the plaintiff.³⁵ A reference to a finding in a judgment may explain the character of the party's possession and the nature of the enjoyment had in the property in suit. Similarly, a finding in a judgment may be referred to in all other cases where the record is matter of inducement or merely introductory to other evidence.³⁶ A judgment against a master or principal for the negligence of his servant or agent is conclusive evidence against the servant or agent of the fact that the master or principal has been compelled to pay the amount of damages awarded, but it is not evidence of the fact upon which it was founded, namely, the misconduct of the servant or agent.³⁷ So, a judgment recovered against a surety will be evidence for him to prove the amount which he has been compelled to pay for the principal debtor; but it furnishes no proof whatever of his having been legally liable to pay that amount through the principal's default.³⁸ A judgment setting aside the transfer of a holding is a fact in issue in pre-emption proceedings instituted by the landlord and therefore admissible under section 43.³⁹ Other instances may be cited where a judgment is admissible in evidence in a subsequent litigation, but in all such cases the existence of the judgment is either a fact in issue or relevant under some other section of the Act.⁴⁰ A judgment, not *inter partes*, is not admissible as having the effect more or less of *res judicata*. For that purpose a judgment *inter partes* alone is admissible. But a judgment, not *inter partes*, may be used to show the conduct of the parties or how the property was dealt with previously.⁴¹ A judgment may be used to

29. *Gujju Lal v. Fattah Lall*, 6 C. 171 (F.B.), per Garth. C.J., 192; see *Hitendra Singh v. Rameswar Singh Bahadur*, 4 P. 510: 88 I.C. 141 & 87 I.C. 849: 1925 P. 625 & 667.

30. Ill. (e) to section 43.

31. Ill. (f) to section 43.

32. *Jangi Singh v. Ganga Singh*, 77 I. C. 391: 1924 O. 115.

33. *Babui Shamsunder Kuer v. Ram. khelawan Sah*, 8 P. 783: 121 I.C. 334: 1929 P. 739.

34. *Hitendra Singh v. Rameswar Singh Bahadur*, 87 I.C. 849: 1925 P. 625; Ill. (d) to section 43.

35. *Hitendra Singh v. Rameswar Singh*

Bahadur, 87 I.C. 849: 1925 P. 625; *Leggat v. Tollervey*, 14 East 302.

36. *Hitendra Singh v. Rameswar Singh Bahadur*, 4 P. 510: 88 I.C. 141 & 87 I.C. 849: 1925 P. 625 & 667.

37. Taylor, § 1667.

38. Woodroffe, Ev., 9th Ed., 428; Taylor, § 1667.

39. *Basanta Kumar Churnakar v. Durga Nath Pal*, 1939 C. 432.

40. *Hitendra Singh v. Rameswar Singh Bahadur*, 4 P. 510: 88 I.C. 141 & 87 I.C. 849: 1925 P. 625 P. & 667.

41. *Lakshman Govind v. Amrit Gopal*, 24 B. 591.

explain or introduce facts in issue or to explain the history of the case.⁴² In such cases, judgment, not *inter partes*, is not used as evidence or proof of the particular point decided by it but is used as evidence of the *factum* of the decision only. There are, however, cases where a judgment, not *inter partes*, has undoubtedly been used as a sort of proof of the particular point decided by it; but the correctness of these cases would appear to be very doubtful. A judgment, not *inter partes*, is not evidence of the point decided by it; all that it can be used to show is that the right asserted by a party in the litigation which resulted in the judgment was recognized or denied by the Court.⁴³ The judgment, itself, however, is not proof of the existence or non-existence of that right. Where the right of a party has already been concluded by a previous judgment, the fact can be proved by the production of the judgment since in such circumstances the existence of the judgment itself is a relevant fact.⁴⁴ See notes to section 13 where this matter has been fully discussed.

Mere recitals of relevant or collateral facts in judgments are inadmissible.—A judgment, whether *inter partes* or not, is not evidence of facts which merely come collaterally in question, or are incidentally cognizable, or can only be inferred by argument from the decision;⁴⁵ nor is a recital of a relevant fact in a judgment, not *inter partes*, admissible in proof of that fact.⁴⁶ See notes to section 13.

Judgment between a party and a stranger.—See notes to section 13 under this heading.

Judgments *inter partes*, which are not admissible under sections 40—42, whether admissible under section 43?—The Evidence Act itself does not draw any distinction between a judgment which is not *inter partes* and a judgment which is *inter partes*, except where the judgment is clearly *res judicata*. A judgment is, therefore, admissible as proof of the point decided by it only when it is admissible under sections 41—42 whether it is *inter partes* or not, and it is not admissible when it is given in evidence under some other section of the Act.⁴⁷ But where in a suit for possession the defendant pleaded occupancy tenancy and the plaintiff to disprove that plea gave in evidence a previous judgment *inter partes* by which the plaintiff's suit for possession had been dismissed on the ground that it was premature but the Court had found that the defendant was

42. Purnima Debya v. Nand Lal Ojha, 11 P. 50: 136 I.C. 577: 1932 P. 105.

43. See M. Misbahuddin v. Vidya Sagar, 1935 L. 64; Mutsaddi v. Mst. Lachhmi, 1935 L. 179; Sri Krishna Dutt Dube v. Ahmadi Bibi, 153 I.C. 708: 1935 A. 187.

44. Maroti Laxman Koshti v. Jagannathdas Lachhmandas, 1939 N. 72.

45. Phipson, Ev., 7th Ed. 394; R. v. Kingston (Duchess), 20 How. St. Tr. 355, 538; R. v. Hutchins, 6 Q. B.D. 300; see Abinash Chandra v. Paresh Nath Ghose, etc., 9 C.W. N. 402.

46. Tripurana Seethapati Rao Dora v. Rokhom Venkanna Dora, 45 M. 332: 66 I.C. 280: 1922 M. 71 (F.B.); Abdul Latif v. Abdul Huq, 81 I.C.

667: 1924 C. 523; Satindra Kumar Chaudhury v. Krishna Kumari Chaudhurani, 36 I.C. 832; Basi Nath Pal v. Jagat Kishore Acharjee Chowdhury, 35 I.C. 298: 23 C. L.J. 588; see also Chhiddu v. Desraj, 77 I.C. 753: 1924 A. 294.

47. Purnima Debya v. Nand Lal Ojha, 11 P. 50: 136 I.C. 577: 1932 P. 105; see also Ramparekha Pande v. Ramjhari Kuer, 149 I.C. 1158: 1933 P. 690; Jhingur Raut v. E., 134 I. C. 625: 1931 P. 386: 32 Cr. L.J. 1224; Hitendra Singh v. Rameswar Singh Bahadur, 4 P. 510: 88 I.C. 141 & 87 I.C. 849: 1925 P. 625 & 667; Ajmer Singh v. Jangir Singh, 1952 Pepsu 76.

not an occupancy tenant, the Privy Council held the judgment to be admissible and observed that it was defendant's paramount duty to displace the finding in the previous suit.⁴⁸ Although a finding in a previous suit *inter partes* does not operate as *res judicata* it is the paramount duty of the party against whom it is given to displace that finding.⁴⁹ See notes to section 13 under the heading "whether judgment shift onus".

Previous judgment in criminal case whether admissible in subsequent trial.—A remark in the judgment in a previous criminal case against the accused is inadmissible in a subsequent case against him.⁵⁰ A judgment passed in a prosecution convicting a person for encroaching upon land belonging to a Municipality will not operate in favour of the prosecution in a subsequent case for refusing to demolish the encroachment.¹

Judgment of a criminal Court is irrelevant in a civil suit as proof of the point decided by the criminal Court.—Where the fact of a person having been acquitted or convicted is relevant, the judgment of the criminal Court acquitting or convicting him may be relevant,² otherwise the judgment of a criminal Court is not admissible in a civil Court as proof of the point decided by the criminal Court.³ Thus, a judgment of acquittal of a criminal charge is irrelevant in a civil suit based on the same cause of action.⁴ Similarly, a judgment of conviction cannot, in a subsequent civil suit, be treated as evidence of the facts on which the conviction is based.⁵ In a suit for damages for malicious prosecution, the judgment of the criminal Court acquitting the plaintiff is not relevant as proof of the plaintiff having been maliciously or falsely charged,⁶ though the judgment may be referred to for the purpose of seeing what the circumstances were which resulted in the acquittal.⁷ The finding of a criminal Court cannot be treated as evidence in a civil action between different⁸ or the same parties; in any case, a civil Court is not bound to adopt the finding of the criminal Court,⁹ and must find the facts for itself and independently of what was decided by the criminal Court.¹⁰ A woman who murders her son is not, according to Hindu Law, entitled to

48. Midnapur Zemindari Co. v. Naresh Narayan Rao, 48 C. 460: 64 I.C. 231; see also Prahlad Chandra Singh v. Bhim Mahto, 1940 P. 341.

49. Sombhunath Bhakat v. Sree Sree Sridhar Thakur, 73 C.L.J. 76; see also Seth Ganga Sagar v. Inam Ali, 48 P.L.R. 195.

50. Ram Nath Dave v. E., 1942 O. 473.

1. K. Ramachandriah Setty, In re, 1948 M. 502: 1948, 1 M.L.J. 403: 1948 M.W.N. 413: 61 M.L.W. 435: 50 Cr. L.J. 21.

2. See Debnath v. Umacharan, 9 C. W.N. 264 (n); Kashyap v. E., 1945 L. 23 (F.B.).

3. Harihar Prasad Singh v. Janak Dulari Kuer, 1941 P. 118; Ramadhar Chaudhary v. Janki Chaudhary, 1956 P. 49.

4. Doorga Dass v. Doorga Charan, 6 W.R. Civ. Ref. 26.

5. Shumboo Chunder Chowdhry v.

Modhoo Kyburt, 10 W.R. 56; Nit-tayanund Surmah v. Kashenath, 5 W.R. 27.

6. Pedda Venkatapathi v. Ganagunta Balappa, 56 M. 641: 143 I.C. 825: 1933 M. 429: 9 Bom. L.R. 1134; Aghorenath Roy v. Radhika Pershad Bose, 14 W.R. 339; Keromutollah Chowdhry v. Gholam Hossein, 9 W.R. 77; but see Rai Jung Bahadur v. Rai Gudor Sahay, 1 C.W.N. 537.

7. Rai Jung Bahadur v. Rai Gudor Sahay, 1 C.W.N. 537.

8. Maung Pein v. Ma The Ngwe, 2 R. 549: 84 I.C. 1009: 1925 R. 143.

9. Ram Lall v. Tularam, 4 A. 97; Nitayanund Surmah, etc. v. Kashenath Nyalunker, 5 W.R. 26.

10. Bishen Das v. Ram Labhaya, 106 P.R. 1915: 32 I.C. 18; Keramutollah Chowdhry v. Gholam Hossein, 9 W.R. 77.

succeed to his property by inheritance. The fact of her being acquitted or convicted by a criminal Court for the murder of her son is irrelevant in a civil Court upon the question whether she has murdered her son or not.¹¹ The judgment of a criminal Court convicting a person of a murder and sentencing him to imprisonment is relevant in a civil Court only to show that there was such a trial resulting in conviction and sentence. It is not evidence of the fact that the convict was the murderer.¹² A judgment in a criminal case in which the plaintiff asserted his possession to the disputed land and possession was held to be with him is inadmissible against a third person who was not a party to the criminal proceedings to prove the plaintiff's possession at the date of the judgment, but is admissible to prove that at the date of the judgment the plaintiff asserted his title to the disputed land.¹³ In an action for damages arising out of a collision between two motor cars, the judgment of the criminal Court convicting the defendant's driver of negligent driving is not relevant.¹⁴

The only sections of the Evidence Act under which a judgment can be held relevant are sections 40 to 43... According to section 43 a judgment which is not relevant under sections 40 to 42 may become relevant under some other section of the Act. In this case sections 11 and 155(a) were considered.¹⁵

Wallis J., in *Gopikaraman v. Atalsingh*, observed that "The Indian Evidence Act does not make findings of facts arrived at on the evidence before the Court in one case evidence of the fact in another case."¹⁶

A judgment of a criminal Court can be used only to prove who the parties to the dispute were and what order was passed; but the facts stated therein or statements of the evidence of the witnesses examined in the case, are not admissible, and the Civil Court is bound to find the facts for itself.¹⁷

The East Pakistan High Court held that a judgment of acquittal in a criminal case, e.g. under section 379 I.P.C. only decides that the accused has not been proved guilty and to this extent only and no more is it to be taken as correct and conclusive in a subsequent Civil Suit between the parties (e.g. in a suit for declaration and injunction) the opinion and conclusions expressed in the judgment being otherwise irrelevant and inadmissible in such proceedings.¹⁸

Any decision of a criminal case cannot be relied on as one binding in a civil action. Equally, the findings in a civil proceedings are not binding on a subsequent prosecution founded upon the same or similar allegations.¹⁹

11. *Vedanayaga Mudaliar v. Vedam-mal*, 14 M.L.J. 297; *Anil Behari Ghosh v. Smt. Laika Bala Dassi*, 1955 S.C. 566.

12. *Anil Behari Ghosh v. Smt. Laika Bala Dassi*, 1955 S.C. 566.

13. *Paran Munda v. Santosh Mahto*, 1942 P. 372.

14. *Hollington v. Hewthorn & Co., Ltd.* (1943) K.B. 27.

15. *Muhammad v. State*, 1960 P.L.D. Lah. 1202.

16. 20 C.W.N. 643.

17. *Ramadhar v. Janki*, 1955 B.L.J.R. 705.

18. *S.N. Gupta v. Sadananda*. 1960 P.L.D. Dacca, 153.

19. *Ses Krishnan Asari v. Adaikalam*, (1966) 1 M.L.J. 348.

There is abundant authority for the proposition that a judgment of acquittal in Criminal Court is irrelevant in a civil suit based on the same cause of action, just as a judgment of conviction cannot in a subsequent civil suit, be treated as evidence of fact on which the conviction is based. The Civil Court must independently of the decision of the criminal Court, investigate facts and come to its own findings.²⁰

Where the prosecution for an offence of failure to furnish the return due under R. 11(1) of the Madras General Sales Tax Rules, punishable under section 15(a) of the Act, ended in an acquittal, because the prosecution failed to prove the guilt of the accused beyond reasonable doubt, on subsequent assessment based on the same questions, it was held: (i) that, sections 40 to 43 of the Act embody primary and fundamental principles governing admissibility of judgments, and unless the assesseees are able to bring their case within the permissible ambit of the said provisions they cannot rely on their success in the criminal Court; (ii) that either the Sales Tax Act or the Rules provide for an election between the two courses, a criminal prosecution and the making of an assessment; (iii) that both courses are open concurrently to the department; (iv) that action in respect of one is no bar to proceedings in the other; (v) that the assesseees cannot seek shelter under the doctrine of *autrefois acquit*; that principle can apply only to a second prosecution for the same offence; and (vi) that the principle of *res judicata* embodied in section 11 C.P. Code; can have no application as its operation is limited to civil actions; nor can the department be precluded from proceeding with the assessment on the ground of acquiescence in the Magistrate's finding and decision.²¹

Evidentiary value of a judgment of a criminal Court.—The judgment of a criminal Court is only relevant about a conviction and acquittal. The findings recorded by the criminal Courts cannot be received as a piece of evidence.²²

Proceeding for the revocation of the grant of probate: Relevancy of the judgment in a previous criminal case wherein the son was convicted of murder.—In a proceeding for revocation of the grant of probate, the question was whether the testator had been murdered by his adopted son. The judgment in the previous criminal case is relevant only to show that there was such a trial resulting in the conviction and sentence of the son to transportation for life; it is not evidence of the fact that he was the murderer. That question has to be decided on evidence.²³

Judgment of a civil Court is not admissible in a criminal Court to establish the truth of the facts found by the civil Court.—In a criminal trial it is for the Court to determine the question of the guilt of the accused and it must do so upon the evidence before it.²⁴ A judgment of a civil Court is not admissible in a criminal proceeding, to establish the

20. Onkarmal v. Banwari Lal, I.L.R. 1962 Raj. 202; 1962 Raj. L.W. 77

21. M/s. Macherlappa and Sons v. Government of Andhra, I.L.R. 1958 A.P. 421.

22. Radha Mohan v. Bare Lal, 1972 A.L.J. 15.

23. Anil Behari Ghose v. Smt. Latika Bala Dassi, (1955) (2) S.C.R. 270; 1955 S.C.J. 578.

24. Trailokyanath Das v. E., 59 C. 136; 137 I.C. 163; 1932 C. 293; 33 Cr. L.J. 441; Gogun Chunder Ghose v. E., 6 C. 247.

truth of the facts upon which it is rendered.²⁵ Where there are concurrent proceedings covering the same ground before a criminal Court and a civil Court, the parties being substantially the same, the judgment of the civil Court, if obtained first, will not be admissible in evidence before the criminal Court in proof or disproof of the fact on which the prosecution is based.²⁶ The findings in a civil proceeding are not binding in a subsequent prosecution founded upon the same or similar allegations. It is the duty of a criminal Court when a prosecution for a crime takes place before it to form its own view and not to reach its conclusion by reference to any previous decision of the civil Court.²⁷ The judgment of a civil Court, holding a document to be a forgery, is not, in a criminal prosecution, evidence of the document being a forgery.²⁸ The petitioner charged the respondent with having defamed him and the latter was convicted. Thereupon the petitioner brought a suit for damages for defamation against the respondent, but the civil Court dismissed the suit. The High Court ordered a retrial setting aside the conviction, and the question arose whether a copy of the judgment of the civil Court was admissible in the criminal proceedings. Held, that the matter was governed by sections 40—43 and the judgment was not admissible under any of these sections as proof of anything material.²⁹ It has, however, been held by the Bombay High Court that where the civil liability of a person arising out of a certain transaction has been determined by a civil Court, the judgment of the civil Court is a good piece of evidence in the criminal proceedings arising out of the same transaction.³⁰ Thus where a civil Court has held that there was no entrustment of any property, the judgment of that Court is admissible to show that there was no entrustment and, therefore, no criminal breach of trust. This rule, it is submitted, is more a rule of policy than a strictly correct rule of evidence and it was so treated by Heaton, J., in the Bombay case last cited. A criminal Court is not entitled to disregard the decree of a civil Court declaring rights to the identical property in dispute in the criminal case.³¹

Criminal cases should be given precedence.—The Supreme Court has laid down the following in *Sheriff v. State of Madras*.

As between the Civil and the criminal proceedings, criminal matters should be given precedence. There is some difference of opinion in the High Courts of India on this point. No hard and fast rule can be

25. *Raghunath Singh v. E.*, 15 P. 386: 1936 P. 537: 165 I.C. 289: 37 Cr. L.J. 1126; *Trailokyanath Das v. E.* 59 C. 136: 137 I.C. 163: 1932 C. 293: 33 Cr. L.J. 441; *Raj Kumari Debi v. Bama Sundari Debi*, 23 C. 610; *Gogun Chunder Ghose v. E.*, 6 C. 247; distinguished in *Damodar Sahu v. State*, 1955 Orissa 156.
26. *Kashvap v. E.*, 1945 L. 23: I.L.R. 1944 L. 408: 217 I.C. 284: 46 Cr. L.J. 296 (F.B.)
27. *E. v. Khwaja Nazir Ahmad*, 1945 P.C. 18; *Mansharam Madhavdas v. Chetanrame Rupchand*, 1945 S. 32.
28. *Trailokya Nath Das v. E.* 59 C. 136: 137 I.C. 163: 1932 C. 293: 33 Cr. L.J. 441; *Tarapada Biswas v. Kalipada Ghose*, 51 C. 849: 88 I.C. 677: 1924 C. 639: 26 Cr. L.J. 117; *Gogun Chunder Ghose v. E.*, 6 C. 247.
29. *Padmanabhini Ramanomma v. Gollusu Appalanarasayya*, 55 M. 346: 136 I.C. 348: 1932 M. 254: 33 Cr. L.J. 307.
30. *In re Markur*, 41 B. 1: 33 I.C. 633: 17 Cr. L.J. 153; see also *In re Velayutham Chetty*, 72 I.C. 172: 1924 M. 516: 24 Cr. L.J. 332.
31. *Varadaraja Chettiar v. Swami Maistry*, 1948 M. 49: 1947 2 M. L. J. 179: 48 Cr. L.J. 1002: 60 M. L. W. 499: 1948 M.W.N. 62; but see *Mst. Hosnaki v. State*, 1956 A. 81.

laid down but the possibility of conflicting decisions in the civil and criminal Courts is not a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one Court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration is likelihood of embarrassment. A civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interests demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust. This, however, is not a hard and fast rule. Special considerations obtaining in any particular case might make some other course more expedient and just.³²

Judgment of acquittal in a suit for damages for malicious prosecution.—See notes to section 13 under this heading.

Malicious Prosecution : Suit for Damages.—Malicious prosecution—Suit for damages—‘Prosecutor’ who is—Determination—First information report for criminal case lodged by first defendant—Other defendants examined therein as prosecution witnesses. Their evidence however not accepted by criminal Court—Such non-acceptance does not and cannot prove conspiracy between those defendants and the first defendant in initiating the prosecution—Hence those defendants are not prosecutors—Suit against them therefore, is not maintainable—First defendant is the prosecutor.³³

Admissibility of a judgment of the criminal Court in a suit for damages.—The judgment of the criminal Court is admissible in evidence in the civil proceedings but only as a *prima facie* evidence of negligence.³⁴

Plea of autrefois acquit.—A plea of *autrefois acquit*, which is statutorily recognised under section 403 Cr. P. C. arises when a person is tried again for the same offence or on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236 or for which he might have been convicted under section 237. Where, however, neither of these provisions is applicable, because the two offences are distinct and spaced slightly by time and place, and require different charges, the Court should order separate trials and the prior acquittal cannot create a bar in reaching a conviction. The earlier judgment is no doubt admissible to show the parties and the decision but it is not admissible for the purpose of relying upon the appreciation of evidence. If the bar under section 403 does not operate, the earlier judgment is not relevant for the interpretation of evidence in the subsequent trial.³⁵

In a prosecution for perjury, the judgment in the proceeding in which evidence was given is inadmissible.—Where a person is on his trial on a charge of having given false evidence, the judgment in the pro-

32. 1954 S.C.J. 458: 1954 S.C.R. 1144.

33. Jogendra Garabdu v. Lingraj, 35 Cut. L.T. 835.

34. Nettleship v. Weston, 1972 A.C.J. 115.

35. Kharkan v. State of U.P., I.L.R. (1964) (1) A. 519.

ceeding in which he is alleged to have given false evidence is not admissible in evidence against him.³⁶

A judgment may be secondary evidence of the pleadings of the parties thereto; and of any statement, admission or acknowledgment.—A previous judgment is admissible to prove a statement;³⁷ or an admission,³⁸ or an acknowledgment³⁹ made by a party or the predecessor in interest of a party in his pleadings in the previous suit. It is also admissible to prove an arrangement come to between the parties to the first suit.⁴⁰ A judgment narrating the substance of the pleadings of the parties to a litigation may furnish evidence of the allegations made by them on that occasion.⁴¹ It should, however, be remembered that when a judgment is used for any of the aforesaid purposes, it is not by itself a relevant fact but merely proof of something relevant contained in the pleadings; the provisions of section 43 are, therefore, not in point when such use is made of a judgment. A judgment is no more than secondary evidence of the pleadings and it is doubtful whether a judgment would at all be admissible for this purpose where original pleadings are available.⁴² In any case recitals in a judgment are no evidence whatever to prove the exact admission made by a party or a witness unless the whole of the statement is recited therein.⁴³ See notes to sections 35 and 13.

Finding by a Co-operative Societies' Deputy Registrar.—This section lays down that judgments are irrelevant unless their existence is a fact in issue or relevant. Thus, the finding given by the Deputy Registrar of Co-operative Societies, surcharging a Hindu father in respect of an amount misappropriated by him, could not be used in evidence in a suit by his sons to avoid the debt as 'Avyavaharika'. His order would be relevant to prove the existence of the order but not the truth of the facts stated therein.⁴⁴

36. *Oates v. E.*, 76 I.C. 417: 1924 C. 104: 25 Cr. L.J. 177.

37. *Krishnasami Ayyangar v. Rajagopala Ayyangar*, 18 M. 73; *S.K. Ramaswami Goundan v. S.N.P. Subbaraya Goundan*, 1948 M. 388; but see *Nanduri Saradamba v. Parakala Pattabhiramayya*, 53 M. 952: 129 I.C. 463: 1931 M. 207; see also the next note.

38. *Collector of Gorakhpur v. Ram Sundar Mal*, 56 A. 468: 150 I.C. 545: 1934 P.C. 157; *Subbaraya Chettiar v. Sellamuthu Asari*, 142 I.C. 548: 1933 M. 184; *Rudra Pratap Narain Singh v. Nirman Prasad Singh*, 74 I.C. 225: 1923 O. 61; *Mirza Shamsher Bahadur v. Kunj Behari Lall*, 7 C.L.J. 414: 12 C. W.N. 273; *Lakshman Govind v. Amrit Gopal* 24 B 591; *Parbutty Dassi v. Purno Chunder Singh*, 9 C. 586; but see *Molar v. Ram Parshad*, 102 I.C. 198: 1927 L. 377; *Tripurana Seethapati Rao Dora v. Rokham Venkanna Dora*, 45 M. 332: 66 I.C. 280: 1922 M. 71

(F.B.).

39. *Obiter in Udamanthala Nalupuratil Ibraine v. Parameswara Bavannavar*, 85 I.C. 996: 1925 M. 1019; see *Harl Chand v. Phiraya Ram*, 11 I.C. 377: 180 P.L.R. 1911; but see *Jaigopal Misir v. Sheo Sagar Singh*, 4 I.C. 579.

40. *Mohammad Ahmad Said Khan v. Masihullah Khan*, 28 I.C. 387.

41. *Kailas Chandra Nag v. Bijay Chandra Nag*, 72 I.C. 680: 1923 C. 18; *Kundan Bibi v. Magan Lal*, 139 I.C. 718: 1932 A. 710.

42. See *Medavarapu Narasayya v. Medavarupa Veerayya*, 154 I.C. 753: 1935 M. 268; *Tripurana Seethapati Rao Dora v. Rokkam Venkanna Dora*, 45 M. 332: 66 I.C. 280: 1922 M. 71 (F.B.); *Ram Sunder Gope Sikdar v. Haribala Dubi*, 37 I.C. 911.

43. *Indra Singh v. Commissioner of Income-tax*, 1943 P. 169.

44. *S. M. Jakati v. S. M. Brokar*, (1959) 2 M.L.J. 21 (S.C.).

Contradicting a witness by a judgment whether admissible as proof of the deposition of a witness or the terms of a document referred to in that judgment?—Where A swore that her son B was born on March 18th, i.e., five days after her marriage, an order of deceased Justices reciting that A swore B was born on March 8th was received to contradict her testimony, though not to prove the bastardy or date of birth.⁴⁵ If the object be to discredit a witness by proving that he has given different testimony in a former trial, the judgment in that case, though the litigating parties be strangers, will be admissible for the purpose of introducing the evidence of his former statement.⁴⁶ But it has been doubted in India whether a judgment is proof of the statement which is attributed to the witness in the judgment.⁴⁷ Extracts from a judgment reproducing what a person stated in his evidence on a former occasion are not admissible to discredit the deponent, unless the statement attributed to him is put to him under section 145 of the Act.⁴⁸ A judgment is not sufficient proof of the terms of a document which is referred to in the judgment.⁴⁹ A Settlement Officer's report on the survey and settlement of a district is not secondary evidence of the contents of the **jama-bandi** statement referred to in the report.⁵⁰ In an Allahabad case, however, an order of the Court which set forth the terms in which an application was made, was treated as secondary evidence of the terms of the application under section 63(3), the original application having been destroyed.¹

Sections 11, 13 and 43.—Absconding accused separated and tried later—Judgment if admissible as evidence in revision in case of other accused. The provisions of sections 11 and 13 read with section 43 of the Evidence Act do not come in aid of the petitioners to establish their plea that the judgment of the 1st Additional Assistant Sessions Judge, Vijayawada acquitting accused 2 and 7 for offences relating to the same transaction under which the petitioners have been convicted by the 2nd Additional Assistant Sessions Judge, Vijayawada, as accused 2 and 7 were absconding and their case was separated from the other accused, is admissible in evidence.²

Motor accidents Tribunal and Criminal Judgment.—The judgment of a criminal Court in a prosecution arising out of a motor accident, determining the guilt or innocence of the driver of the motor vehicle concerned, is neither conclusive nor binding on the Motor Accidents Claims Tribunals, dealing with a claim petition under section 110-C of the Motor Vehicles Act, and its findings as to the guilt or otherwise of the driver are wholly irrelevant for the purpose of the trial on merits of the claim petition before the Motor Accidents Claims Tribunal. Such judgment

45. Woodroffe Ev., 9th Ed., 428, citing *Watson v. Little*, 5 H. & N. 472; Taylor, § 1668.

46. Taylor, § 1668.

47. *Nanduri Saradamba v. Parakala Pattabhiramayya*, 53 M. 952: 129 I.C. 463: 1931 M. 207; *Asa Singh v. Mansha Ram*, 121 I.C. 509: 1930 L. 237.

48. *Nanduri Saradamba v. Parakala Pattabhiramayya*, 53 M. 952: 129 I.C. 463: 1931 M. 207.

49. *Jaganatha Naidu v. Secretary of State*, 70 I.C. 107: 1922 M. 334;

Ram Harakh v. Jagdamba Debi, 54 I.C. 574; see *Ambalavana Pandarasannadhi v. Kuppachi Janaki Ammal*, 35 I.C. 201; *Ambalavana Pandara Sannadhi v. Kuppachi Janaki Ammal*, 26 I.C. 618.

50. *Surendra Nath Karan Deo v. Kamakhya Narain Singh* 123 I.C. 145: 1930 P.C. 45.

1. *Kundan Bibi v. Magan Lal*, 139 I.C. 718: 1932 A. 710.

2. *Bojigani Moogadu, In re.* (1971) 1 An. W.R. 316.

can however be relevant only for the purpose and to the extent specified in section 43.³

44. Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under sections 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

COMMENTARY

Avoiding circumstances of a judgment admitted under section 40, 41 or 42.—This section mentions the circumstances which, if proved, would avoid the evidentiary effect of a judgment admitted under section 40, 41 or 42; it does not apply to judgments admissible under section 43.⁴ The section provides that a party to a suit or other proceeding may show that a judgment, order or decree which is relevant under section 40, that is, which would, as a judgment *inter partes*, operate as *res judicata*; or which is relevant under section 41, that is, which is evidence as a judgment *in rem*; or which is relevant under section 42, that is, which is evidence as a judgment relating to a public matter,—and which is proved by the adverse party, was passed by a Court which had no jurisdiction to pass it or was obtained by fraud or collusion.⁵ The section does not apply to transfers of property either as a part of the decree or in carrying out the decree.⁶ The section is very wide and lays down not merely a rule of law relating to evidence but also a rule of procedure as to how the judgment should be impeached.⁷

In order to render the earlier decree inoperative it is not necessary that it should be reversed or superseded by proceedings arising out of the same case. On the other hand, it may be collaterally superseded and rendered ineffective even by some ulterior and independent proceedings. What is material is that the parties to the first decree must also be parties to the subsequent proceedings so that the decision in such subsequent proceedings may be binding on them. The rights and liabilities covered by the decree must also have been considered and adjudicated upon in the subsequent proceedings. When there have been two adjudications binding on the same parties in respect of the same right, the later adjudication has to prevail over the earlier one.⁸ The section is not exhaustive

3. Municipal Committee, Jullundur City v. Shri Ramesh Saggi, 72 Pun. L.R. 452; 1969 A.C.J. 135.

4. Sankhavaram v. Rangasubbe Akkappa Rao, 1941 M. 569; 53 M.L.W. 352.

5. Sita Devi v. Gopal Narayan Singh 111 I.C. 762; 1928 P. 375; Prayag Kumari Debi v. Siva Prosad Singh, 93 I.C. 385; 1926 C. 1; Biswa Nath Prosad Mahata v. Bhagwandin Pandey, 10 I.C. 536; 14 C.L.J. 648; Rajib Panda v. Lakhan Sendh Mahapatra, 27 C. 11.

6. Arvi Co-operative Credit Society,

Ltd. v. Dhondiram Navalchand 1940 B. 289; I.L.R. 1940 B. 526; 190 I.C. 606.

7. Bishunath Tewari v. Mst. Mirchi, 1955 P. 66.

8. Padmanabhan Krishnan v. Mathevan Pillai Kesava Pillai 1952 T. C. 294; Shama Purshad v. Hurro Purshad, 10 M.I.A. 203; Naganna v. R. Venkatapayya, 1923 P.C. 167; Moturi Seshayya v. Venkata-dri Appa Row, 1917 M. 950; 31 M.L.J. 219; Rukamani Ammal v. Narasimma Iyer, 1921 M. 612; 1921 M.W.N. 487.

of the grounds on which a decree can be set aside. It deals only with cases in which a party to a suit or other proceeding has been properly represented. It does not cover cases of decrees passed against dead persons and against minors and lunatics who are not properly represented or against whom a decree has not been duly obtained. So a decree can be set aside also on one of these grounds.⁹ A compromise decree can be set aside on the ground of misrepresentation, undue influence, coercion, etc.¹⁰

The section is applicable both to civil and criminal proceedings. In cognizable cases, the Magistrate no doubt controls the proceedings, but, even in such cases, it is possible for a private complainant to collude with the accused and obtain an acquittal by perpetrating fraud upon the Court. It can, therefore, be shown that the acquittal was brought about by fraud or collusion, and is therefore a nullity.¹¹

Avoiding circumstances may be shown in the proceedings in which the decree or order is given in evidence.—When a judgment is given in evidence under section 40, 41 or 42, the party against whom it is given in evidence may, in the proceeding in which it is given in evidence, show that the judgment was given by a Court not competent to give it, or that it was obtained by fraud or collusion, and a separate suit to have the judgment set aside is not necessary. Having regard to the wide terms of section 44, it cannot be said that it is not open to a Court other than the Court from which a grant of administration has issued, in cases of fraud or collusion, to deal with the matter and decide whether the grant was obtained by fraud or collusion. But in such cases where it is open to the party alleging fraud or collusion to apply to the Court from which the grant issued, the better course would be to stay the suit filed on the basis of the letters of administration, to enable an application to be made to the proper Court to revoke the grant.¹² It has, however, been held by a Calcutta Full Bench that it is not open to a Court in proceedings for rateable distribution under section 73, C.P. Code, to inquire as to the validity of a decree, the holder of which claims to be entitled to rateable distribution, and that a decree-holder is entitled to share in the assets of the judgment-debtor, unless the decree is set aside in appropriate proceedings taken for the purpose.¹³

The plea of *res judicata* presupposes a valid and legal decree or judgment. Where the decree is a nullity and non-existent in the eye of law, no plea of *res judicata* can be founded upon it. A party to the suit in which such a decree was obtained just as much as any stranger can show that it is so.¹⁴

Foreign judgment may be assailed by a stranger on the grounds mentioned in the section.—A decree in rem passed by a foreign Court can be assailed in India even by persons who were not parties to the suit in which it was pronounced, on the ground that it was not pronounced by a Court of competent jurisdiction or that it was obtained by fraud or collusion.¹⁵

9. Moti Lal v. Murli, 1951 A.W.R. (H.C.) 407.

10. Moti Lal v. Murli, 1951 A.W.R. (H.C.) 407.

11. Narmada Prasad Singh v. State of Vindhya Pradesh 1956 V.P. 30.

12. Rakshab Mandal v. Tarangini Deyi, 62 I.C. 448: 1921 C. 332.

13. Biswambar Biswas v. Aparna Charan Mohary, 62 C. 715: 155 I.C. 480: 1935 C. 290 (F.B.).

14. Bengal Coal Co. Ltd v. Balmukunda Goenka, I.L.R. 1951, 1 Cal. 168.

15. Sita Devi v. Gopal Narayan Singh, 111 I.C. 762: 1928 P. 375.

WANT OF JURISDICTION

Judgment delivered by a Court "not competent" to deliver it is void; distinction between total want of jurisdiction and erroneous exercise of jurisdiction.—Venkatarama Ayyar, J., in delivering the judgment of the Supreme Court in *Kiran Singh v. Chaman Paswan* observed.

"It is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity, and that invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject matter of the action, strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by consent of parties".¹⁶ The words "not competent" in section 44 refer to a Court acting without jurisdiction.¹⁷ The section refers to the lack of inherent jurisdiction in the Court and not to its territorial jurisdiction.¹⁸ In Article 46 of Sir James Stephen's Digest of the law of evidence, the corresponding rule of English law is stated to be that whenever a judgment is offered as evidence, the party against whom it is so offered may prove that the Court which gave it had no jurisdiction. The "competency" of a Court and its "jurisdiction" are thus synonymous terms.¹⁹ A judgment or decree passed without jurisdiction is a nullity;²⁰ and when a decree is void and a nullity; it is the duty not only of the Court which passed it to ignore it but of every Court to which it is presented.²¹ There must, however, be a manifest lack of jurisdiction in the Court to render its decree or judgment void.²² Jurisdiction may be defined to be the power of a Court to hear and determine a cause, to adjudicate or exercise any judicial power in relation to it. Such jurisdiction naturally divides itself under three broad heads, namely, with reference to (i) the subject-matter, (ii) the parties, and (iii) the particular question which calls for decision. Questions of jurisdiction may consequently arise in one of three ways, that is, either in relation to the subject-matter, or in relation to the parties, or in relation to the question submitted for the decision of the Court.²³ "This classification into territorial jurisdiction, pecuniary jurisdiction and jurisdiction of the subject-matter is obviously of a fundamental character. Given such jurisdiction, we must be careful to distinguish exercise of jurisdiction from existence of jurisdiction, for fundamentally different are the consequences of failure to comply with statutory requirements in the

16. (1955) (1) S.C.R. 117 (S.C.).

17. *Kettilamma v. Kelappan*, 12 M. 228.

18. *Hiralal v. Kalinath* 1955 A. 569.

19. *Sardarmal Jagonath v. Aranvayal Sabhapathy Moodaliar*, 21 B. 205, 212.

20. *Keshavlal Sakhidas v. Amarchand Somchand*, 57 B. 456; 148 I.C. 116; 1933 B. 398; *Sita Devi v. Gopal Saran Narayan Singh*, 111 I.C. 762; 1928 P. 375; *Ishan Chandra Banikya v. Moomraj Khan*, 97 I.C. 770; 1926 C. 1101; *Gora Chand Halder v. Profulla Kumar Roy*, 53 C. 166; 89 I.C. 685; 1925 C. 907 (F.B.); *Peary Lal Roy Chaudhuri v. Secretary of State* 83 I.C. 446;

1924 C. 913; *Hridayanath Roy v. Ram Chandra Barua Sarma*, 48 C. 138; 58 I.C. 806; 1921 C. 34 (F.B.); See *Gunnesh Pattro v. Ram Nidhee Koodoo*, 22 W.R. 361; *Doorga Das Dutt v. Umbika Churn*, 19 W.R. 284.

21. *Kunja Mohan Chakravarty v. Manindra Chandra Roy Chaudhury*, 77 I.C. 253; 1923 C. 619.

22. 3 N.L.R. 185.

23. *Hridayanath Roy v. Ram Chandra Barua Sarma*, 48 C. 138; 58 I.C. 805; 1921 C. 34 (F.B.); Order of Reference to Full Bench in *Sukh Lal v. Tara Chand*, 33 C. 68; 2 Cr. L.J. 618.

assumption and in the exercise of jurisdiction. The authority to decide a cause at all, and not the decision rendered therein, is what makes up jurisdiction, and when there is jurisdiction of the person and subject-matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction".²⁴ The distinction between cases where jurisdiction is assumed by a Court where there is absolute want of it and those where the Court in the exercise of its jurisdiction acts wrongly is of fundamental importance.²⁵ In the former case the decision is void and a nullity;²⁶ whereas in the latter case it is merely voidable²⁷ and has due effect, unless set aside by appropriate proceedings.²⁸ "It cannot be said that wherever a decision is wrong in law or violates a rule of procedure the Court must be held incompetent to deliver it. It has never been and could not be held that a Court which erroneously decrees a suit which it should have dismissed as time-barred or as barred by the rule of *res judicata* acts without jurisdiction and is not competent to deliver its decree".²⁹

The section has nothing to do with the competency of the former court to try the subsequent suit.³⁰

Separate proceedings to set aside a decree or an order made without jurisdiction are not necessary.—This section clearly provides that when a judgment is offered as evidence, the party against whom it is so offered may prove that the Court which gave it had no jurisdiction.³¹ Objection to a judgment, order or decree on the ground of want of jurisdiction may be taken by anybody, whether party or stranger. An order made without jurisdiction being null and void, it is not necessary to take independent proceedings to have it set aside.³² When any such order is tendered in evidence against a party in a proceeding, he may in that very proceeding show the order to be a nullity, on the ground that it was made by a Court having no jurisdiction to make it.³³ If a judgment is

24. Hridyanath Roy v. Ram Chandra Barua Sarma, 48 C. 138: 58 I.C. 806: 1921 C. 34 (F.B.), per Mookerjee, A.C.J.

25. Ishan Chandra Banikya v. Moomraj Khan, 97 I.C. 770: 1926 C. 1101; Gora Chand Haldar v. Profulla Kumar Roy, 53 C. 166: 39 I.C. 685: 1925 C. 907 (F.B.); Pramatha Nath Bose v. Bhuban Mohan Bose, 49 C. 45: 64 I.C. 980: 1922 C. 321; Hridyanath Roy v. Ram Chandra Barua Sarma, 48 C. 138: 58 I.C. 806: 1921 C. 34 (F.B.); Sardarmal Jagonath v. Aranvayal Sabhapathy Moodliar, 21 B. 205, 212.

26. Ishan Chandra Banikya v. Moomraj Khan, 97 I.C. 770: 1926 C. 1101; Peary Lal Roy Chaudhuri v. Secretary of State, 83 I.C. 446: 1924 C. 913; Hridyanath Roy v. Ram Chandra Barua Sarma, 48 C. 138: 58 I.C. 806: 1921 C. 34 (F.B.).

27. Hridyanath Roy v. Ram Chandra Barua Sarma, 48 C. 138: 58 I.C. 806: 1921 C. 34 (F.B.).

28. Ishan Chandra Banikya v. Moomraj

Khan, 97 I.C. 770: 1926 C. 1101, Nathu Ram v. Kolian Das, 26 A. 522.

29. Woodroffe, Ev., 9th Ed., 432; Ishan Chandra Banikya v. Moomraj Khan, 97 I.C. 770: 1926 C. 1101; Nathu Ram v. Kolian Das, 26 A. 522; Carston v. Carston, 22 A. 270 (F.B.).

30. Newton Hickie v. Official Trustee of West Bengal, 1954 C. 506.

31. Sardarmal Jagonath v. Aranvayal Sabapathy Moodliar, 21 B. 205, 212.

32. Keshavlal Sakhidas v. Amarchand Somchand, 57 B. 456: 148 I.C. 116: 1933 B. 398; Prayag Kumari Debi v. Siva Prosad Singh, 93 I.C. 385: 1926 C. 1; Peary Lal Ray Chaudhuri v. Secretary of State, 83 I.C. 446: 1924 C. 913; Bansi Lal and others v. Dhapo, 24 A. 242.

33. Golab Sao v. Chowdhury Madho Lal, 9 C.W.N. 956; see Gunnessh Pattro v. Ram Nidhee Koondoo, 22 W.R. 361; see also Padmanabhan Krishnan v. Mathevan Pillai Kesava Pillai, 1952 T.C. 294.

given in evidence under section 40 of the Evidence Act in support of a plea of *res judicata*, the party against whom the judgment is offered in evidence may avoid the judgment by proving that the Court which gave the judgment had no jurisdiction.³⁴ In proceedings for rateable distribution of assets under section 73, C. P. Code, however, the Court is not entitled to inquire into the validity of a decree. The proper course for the judgment-debtor in such a case is to have the decree set aside in separate proceedings.³⁵

The Court executing a decree is entitled to refuse to execute it if it was made by a Court not having jurisdiction.—Though this section is not strictly relevant to the question whether an executing Court can refuse to execute a decree made by a Court not having jurisdiction,³⁶ it has, on principle, been held that an executing Court can execute only a valid decree and that a void decree ought to be disregarded by the executing Court, even though formal proceedings have not been taken to have it set aside.³⁷ Where the decree presented for execution was made by a Court which apparently had no jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person to make the decree, the executing Court is entitled to refuse to execute it, on the ground that it was made without jurisdiction.³⁸ Absolute want of jurisdiction should, however, be distinguished from an erroneous exercise of jurisdiction,³⁹ the decree in the latter case not being void.

Section is subject to section 11 of the Code of Civil Procedure.—This section is to be read subject to section 11 of the Code of Civil Procedure. Where a question as to jurisdiction of the Court was in issue in the previous suit and a finding given on it, the parties would not be allowed to resort to this section in a subsequent proceeding.⁴⁰

FRAUD

Fraud as an avoiding circumstance of a judgment, order or decree—Fraud vitiates the most solemn proceedings of Courts of Justice,⁴¹ and reopens and nullifies all judicial acts.⁴² The validity of a judgment, order or decree may be questioned on the ground that it was pronounced through fraud, contrivance or covin of any description,⁴³ and it is

34. *Abdul Kadir Ibrahim v. Dulanbibi*, 37 B. 563: 20 I.C. 530.

35. *Biswambar Biswas v. Aparna Charan Mohary*, 62 C. 715: 155 I. C. 480: 1935 C. 290 (F.B.).

36. See *Biswa Nath Prosad Mahata v. Bhagwandin Pandey*, 10 I.C. 536: 14 C.L.J. 648.

37. *Jungli Mal v. Laddu Ram Marwari*, 50 I.C. 529 (F.B.); *Subramania Aiyar v. Vaithinatha Aiyar*, 38 M. 682: 31 I.C. 198; *Imdad Ali v. Jagan Lal*, 17 A. 478; *Haji Musa Haji Ahmed v. Purmand Nursey*, 15 B. 216; but see *Biswambar Biswas v. Aparna Charan Mohary*, 1935 C. 290 (F.B.).

38. *Gora Chand Halidar v. Profulla*

Kumar Roy, 53 C. 166: 89 I.C. 685: 1925 C. 907 (F.B.), overruling *Kalipada Sirkar v. Harimohan Dalal*, 44 C. 627: 35 I.C. 856; *Biswa Nath Prosad Mahata v. Bhagwandin Pandey*, 10 I.C. 536: 14 C.L.J. 648.

39. *Gora Chand Halidar v. Profulla Kumar Roy*, 53 C. 166: 89 I.C. 685: 1925 C. 907 (F.B.).

40. *Newton Hickie v. Official Trustee of West Bengal*, 1954 C. 506.

41. *Duchess of Kingston's Case*, 20 How. St. Tr. 355.

42. *Narsing Das v. Bibi Rafikan*, 37 C. 197: 5 I.C. 198.

43. *Bandon v. Becher*, 3 C. & F. 510.

competent to any Court to vacate any judgment, order or decree, if it be proved that it was obtained by manifest fraud.⁴⁴

Fraudulent nature of the judgment, order or decree may be proved in the proceeding in which it is tendered in evidence, and a previous separate suit to have it set aside is not necessary.—A judgment, order or decree obtained by fraud upon a Court binds not such Court, nor any other, and its nullity upon this ground, though it has not been reversed or set aside, may be alleged in a collateral proceeding.⁴⁵ Section 44 lays down not only a rule of evidence but also a rule of procedure. Under this section it is competent for a party against whom a judgment, order or decree has been proved under section 40, 41, or 42 to show in the very proceeding in which it has been so proved that the judgment, order or decree was obtained by fraud, and it is not necessary for him to have it previously set aside by a separate suit.⁴⁶ Proof of fraud is sufficient to nullify a decree or order, whether under the Civil Procedure Code or otherwise; e.g., an entry in a Settlement record or Record of Rights,⁴⁷ without that order, decree or entry having been formally set aside, and even though a suit to have the decree or order set aside has become time-barred.⁴⁸ But a Court cannot refuse rateable distribution to a decree-holder under section 73, C. P. Code, on the ground that his decree was obtained by fraud, unless the decree is set aside by appropriate proceedings taken for the purpose.⁴⁹

No res judicata if the previous judgment, order or decree was obtained by fraud or collusion.—The rule as to *res judicata* must be taken to be qualified by the provisions of section 44 of the Evidence Act.⁵⁰ If the previous judgment, order or decree was obtained by fraud or collusion, there can be no question of *res judicata*.¹ The rule allowing the vacating of a judgment for fraud is not an exception to the rule of *res*

44. *Paranjpe v. Kanade*, 6 B. 148; *Philipson v. The Earl of Egremont*, 6 A. & E. 587, 605.

45. *R. v. Saddlers Co.*, (1863) 10 H.L.C. 404, 431, per Willes, J.; *Hare Krishna Sen v. Umesh Chandra Dutt*, 62 I.C. 962: 1921 P. 193 (F.B.).

46. *Bhagwandas Naraindas v. Patel & Co.*, 1940 B. 131: 187 I.C. 867: 41 Cr. L.J. 526: 42 Bom. L.R. 231; *Bhola Nath Bose v. Nagendra Bala Chaudhurani*, 110 I.C. 571: 1928 C. 810; *Prayag Kumari Debi v. Siva Prosad Singh*, 93 I.C. 385: 1926 C. 1; *Pulin Behari Dey v. Satya Charan Dev*, 70 I.C. 548: 1923 C. 79; *Hare Krishna Sen v. Umesh Chandra Dutt*, 62 I.C. 962: 1921 P. 193 (F.B.); *Rakshab Mandal v. Tarangini Deyi*, 62 I.C. 448: 1921 C. 332; *Aswini Kumar Samadhar v. Banamali Chakrabarty*, 40 I.C. 607: 21 C.W.N. 594; *Rajib Panda v. Lakhan Sendh Mahapatra*, 27 C. 11; *Bansi Lal v. Dhapo*, 24 A. 242; *Manchhram v. Kalidas*, 19 B. 821; *Bishunath Tewari v. Mst. Mirchi*, 1955 P. 66;

see *Nistarini Dassi v. Nundo Lal Bose*, 30 C. 369; *Ahmedbhoy Hubibhoy v. Vulleebhoy Cassumbhoy*, 6 B. 703.

47. *Hare Krishna Sen v. Umesh Chandra Dutt*, 62 I.C. 962: 1921 P. 193 (F.B.); *Sib Saran Shah v. Kameswar De*, 60 I.C. 640: 1921 P. 359; *Mir Mozuffar Ali v. Kali Prosad Saha*, 22 I.C. 789 (2).

48. *Bhola Nath Bose v. Nagendra Bala Chaudhurani*, 100 I.C. 571: 1928 C. 810; *Rajib Panda v. Lakhan Sendh Mahapatra*, 27 C. 11.

49. *Biswambar Biswas v. Aparna Charan Mohary*, 62 I.C. 715: 155 I.C. 480: 1935 C. 290 (F.B.).

50. *Radha Kishen v. Wajid Ali Khan*, 36 I.C. 746; *Abdul Kadir Ibrahim v. Dulanbibibi*, 37 B. 563: 20 I.C. 530.

1. *Hare Krishen Sen v. Umesh Chandra Dutt*, 62 I.C. 962: 1921 P. 193 (F.B.); *Radha Kishen v. Wajid Ali Khan*, 36 I.C. 746; *Krishnabhupati v. Ramamurti*, 16 M. 198.

judicata but is independent, and outside the scope, of that principle.² But if the decree has been acted upon after the person questioning it became aware of its fraudulent nature, it will be no longer open to him to question it.³

What is fraud?—It is impossible to define the grounds on which fraud can be proved.⁴ The Evidence Act does not define fraud, but the Indian Contract Act defines it as follows:—“‘Fraud’ means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract—

- (i) the suggestion, as a fact, of that which is not true by one who does not believe it to be true;
- (ii) the active concealment of a fact by one having knowledge or belief of the fact;
- (iii) a promise made without any intention of performing it;
- (iv) any other act fitted to deceive;
- (v) any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence in itself is equivalent to speech”.⁵

In the absence of any special definition of it, the word “fraud” should be taken to have been used in section 44 of the Evidence Act in its ordinary sense which has been adopted in section 17 of the Contract Act.

Fraud in section 44 means “actual” and not “constructive” fraud.—Writers on equity distinguish two kinds of fraud, viz., actual or positive fraud and constructive fraud. The former is applied to those cases in which there is an intention to commit a cheat or deceit upon another person to his injury. “By constructive frauds are meant, says Mr. Story, such acts or contracts as, although not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interest, deemed equally reprehensible with positive fraud, and, therefore, are prohibited by law as within the same reason and mischief as acts and contracts done *malo animo*. It is only in connection with the subject of actual or positive fraud that Mr. Story mentions frauds in verdicts, judgments, decrees and other judicial proceedings,”⁶ and it is

2. Logadapatti Chinnayya v. Kotla Ramanna, 38 M. 203: 19 I.C. 579.

3. Pulin Behari Dey v. Satya Charan Dey, 70 I.C. 548: 1923 C. 79.

4. Muktamala Dasi v. Ram Chandra

De, 31 C.W.N. 258: 1927 C. 84: 97 I.C. 879.

5. Section 17, Act IX 1872.

6. Field, Ev., 8th Ed., 376-77.

in this restricted sense that the word seems to have been used in section 44. In order to get rid of a former judgment, it is not sufficient for a person to prove constructive fraud,⁷ he must prove actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and the obtaining of that judgment by that contrivance.⁸ A prior judgment cannot be upset on a mere general allegation of fraud or collusion, it must be shown how, when, where and in what way the fraud was committed.⁹ A party alleging fraud is bound to establish it by cogent evidence and suspicion cannot be accepted as proof.¹⁰ Fraud can be proved by circumstantial evidence, and if the circumstances are such as from which no other inference except that of fraud can be deduced, it would not be right to throw out the plea merely for want of direct proof.¹¹

Fraud must be extrinsic or collateral to everything adjudicated upon and not such as has been dealt with by the Court passing the judgment sought to be vacated.—Fraud must be extraneous to the decree;¹² it must be fraud, vitiating the proceedings in which the decree was passed.¹³ The decree should have been obtained by fraud practised upon the Court¹⁴ or by preventing a party by tricks and misrepresentations from conducting his case properly.¹⁵ In order that fraud may be a ground for vacating a judgment, it must be a fraud that is extrinsic or collateral to everything that has been adjudicated upon, and not such as has been or must be deemed to have been dealt with by the Court that passed the judgment sought to be vacated.¹⁶

It may be shown that the Court was misled, but not that the Court was mistaken; decree cannot be attacked on the ground that it was procured by perjured evidence.—With respect to the question, what consti-

7. Bishen Singh v. Wasawa Singh, 92 I.C. 317: 1926 L. 177; Laxmi Narain Gadodia v. Mohd. Shafi Bari, 1949 E.P. 141.
8. Bishen Singh v. Wasawa Singh, 92 I.C. 317 : 1926 L. 177; Janki Kuer v. Lachmi Narain, 37 A. 535: 30 I. C. 789; Nanda Kumar Howladar v. Ram Jiban Howladar, 41 C. 990: 23 I.C. 337; Patch v. Ward, 1867, 3 Ch. A. 203: 18 L.T. 134; Mahomed Hashim Ali v. Iffat Ara Hamidi Begum, 1942 C. 180: 200 I.C. 392; Laxmi Narain Gadodia v. Mohd. Shafi Bari, 1949 E.P. 141; Kerr on Fraud & Mistake, 5th Ed., 344.
9. Shidden v. Patrick, 1854, 1 Macq. 535: 149 R.R. 55; Laxmi Narain Gododia v. Mohd. Shafi Bari, 1949 E.P. 141.
10. Hans Raj Gupta v. Dehradun Mussoorie Electric Tramway Co. Ltd., 1940 P.C. 98; A.L.N. Narayana Chettyar v. Official Assignee, High Court Rangoon, 1941 P.C. 93: 196 I.C. 404; ref. in Laxmi Narain Gadodia v. Mohd. Shafi Bari, 1949 E.P. 141.
11. Laxmi Narain v. Mohd. Shafi Bari, 1949 E.P. 141.
12. Jagarnath Prasad v. Bahurani, 62 I.C. 594; Manindra Nath Mitra v. Hari Mandal, 54 I.C. 626: 24 C.W. N. 133; Kadirvelu Nainar v. Kuppuswami Naicker, 41 M. 743: 45 I. C. 774 (F.B.); Nanda Kumar Howladar v. Ram Jiban Howladar, 41 C. 990: 23 I.C. 337; Logapatti Chinnayya v. Kotla Ramanna, 38 M. 203: 19 I.C. 579; Maung Aung Myat v. Ma Ywet, 10 I.C. 180.
13. Muktamala Dasi v. Ram Chandra De, 97 I.C. 879: 1927 C. 84; Punjab Commercial Syndicate v. Punjab Co operative Bank, Ltd., 6 L. 512: 92 I.C. 322: 1926 L. 96; Janki Kuer v. Mahabir Singh, 58 I.C. 317; Ram Narain Lall Shaw v. Tooki Sao, 58 I.C. 182.
14. Muktamala Dasi v. Ram Chandra De, 97 I.C. 879: 1927 C. 84; Janki Kuer v. Mahabir Singh, 58 I.C. 317.
15. See Janki Kuer v. Mahabir Singh, 58 I.C. 317.
16. Musthan v. Mohendra Nath Singh, I.R. 560: 76 I.C. 794: 1924 R. 119; Logadapatti Chinnoyya v. Kotla Ramanna, 38 M. 203: 19 I.C. 579.

tutes fraud for which a decree can be set aside, two propositions appear to be well established. The first is that although it is not permissible to show that the Court in the former suit was mistaken, it may be shown that it was misled; in other words, where the Court has been intentionally misled by the fraud of a party and a fraud has been committed upon the Court with the intention to procure its judgment, it will vitiate its judgment. The second is that a decree cannot be set aside merely on the ground that it has been procured by perjured evidence.¹⁷ There has been considerable difference of opinion in England as to whether an action would lie to set aside the judgment of an English Court on the ground that it had been obtained by perjured evidence.¹⁸ In this country also there has been some difference of opinion as to whether a decree can be set aside on the ground that it was obtained by perjured evidence. In **Muhammad Gulab v. Muhammad Suliman**,¹⁹ it was held that it could not, and this has been followed, though not uniformly,²⁰ in other cases in the Calcutta High Court. The Madras High Court in **Venkatappa Naick v. Subba Naick**²¹ held that deliberate perjury is a ground upon which a decree can be set aside. This decision was, however, overruled by the Full Bench in **Kadirvelu Nainar v. Kuppaswami Naicker**.²² The Allahabad High Court also has held that a judgment cannot be vacated on the ground that it was obtained by perjured evidence.²³ Thus, so far as the Courts of this country are concerned, there is at present little or no difference of opinion on the point that a decree cannot be got rid of merely on the ground that it was procured by false and perjured evidence.²⁴ It is not sufficient to allege that the judgment or decree was

17. Per Chatterjee, J., in **Manindra Nath Mitra v. Hari Mondal**, 54 I.C. 626: 24 C.W.N. 133, citing **Baker v. Wadsworth**, (1898), 67 L.J. Q.B. 301; **Nanda Kumar Howladar v. Ram Jiban Howladar**, 41 C. 990: 23 I.C. 337; **Moruful Huq v. Surendra Nath Roy**, 15 I.C. 893: 16 C.W.N. 1002; **Abdul Haque Chowdhury v. Abdul Hafez**, 5 I.C. 648: 11 C.L.J. 636; **Mahomed Golab v. Mahomed Sulliman**, 21 C. 612, 619; see also **Logadapatti Chinnoyya v. Kotla Ramanna**, 38 M. 203: 19 I.C. 579, where it has been remarked that the judgment of the Court includes the decision of the question whether the testimony of any witness is true or false and whether a document produced in evidence is genuine or not.

18. **Kadirvelu Nainar v. Kuppaswami Naicker**, 41 M. 743: 45 I.C. 774 (F.B.), per Wallis, C.J.; **Baker v. Wadsworth**, (1898) 67 L.J.Q.B. 301; **Flower v. Lloyd**, (1878) 10 Ch. D. 327 and **Pach v. Ward**, (1867) 3 Ch. App. 208, favour the view that an action to set aside a decree on the ground of its having been obtained by perjured evidence does not lie; but **Cole v. Longford**, (1898) 2 Q.B. 36, **Vadala v. Lawes**, (1890) 25 Q.B.D. 310; **Priestman v.**

Thomas, (1884) 9 P.D. 210 and **Abouloff v. Oppenheimer**, (1832) 10 Q.B.D. 293, seem to support the contrary conclusion.

19. **Mahomed Golab v. Mahomed Suliman**, 21 C. 612.

20. See **Lakshmi Charan Shaha v. Nur Ali**, 38 C. 936: 11 I.C. 626.

21. **Venkatappa Naick v. Subba Naick**, 29 M. 179.

22. **Kadirvelu Nainar v. Kuppaswami Naicker**, 41 M. 743: 45 I.C. 774 (F.B.).

23. **Janki Kuar v. Lachmi Narain**, 37 A. 535: 30 I.C. 789.

24. **Muktamala Dasi v. Ram Chandra De**, 97 I.C. 879: 1927 C. 84; **Mushtan v. Mohendra Nath Singh**, I.R. 500: 76 I.C. 794: 1924 R. 119; **Ram Narain Lall Shaw v. Tooki Sao**, 58 I.C. 182; **Kripa Sindhu Panigrahi v. Nanda Charan Panipatu**, 56 I.C. 615; **Manindra Nath Mitra v. Hari Mondal**, 54 I.C. 626: 24 C.W.N. 133; **Chattu Singh v. Radha Kishun**, 50 I.C. 451; **Kasiswar Goswami v. Amiruddin**, 47 I.C. 14: 23 C.W.N. 133; **Kadirvelu Nainar v. Kuppaswami Naicker**, 41 M. 743: 45 I.C. 774 (F.B.); **Janki Kuar v. Lachmi Narain**, 37 A. 535: 30 I.C. 789; **Moruful Huq v. Surendra Nath Roy**, 15 I.C. 893: 16 C.W.N. 1002.

obtained on a false claim,²⁵ or by false evidence, as the judgment sought to be vacated must be taken as having decided the question whether the testimony of any witness was true or false and whether any document produced in evidence was genuine or not;²⁶ nor is mere suppression of evidence or production of wrong evidence sufficient to vitiate a previous judgment or decree.²⁷ But where there has been a wilful suppression of evidence and the evidence withheld is of such a character that, if it had been produced, the probabilities are that the Court would have come to a different conclusion, a suit will lie to set aside the decree.²⁸ If the claim in the previous suit was false and the falsity of the claim was necessarily known to the party putting forward the claim, the decree in that suit is liable to be set aside.²⁹

Ex parte decree is invalid if obtained by fraudulent suppression of summonses.—For purposes of section 44 an *ex parte* decree stands on the same footing as a decree in a defended suit.³⁰ An *ex parte* decree will be set aside if it is proved to have been obtained by fraudulent suppression of summonses.³¹ Mere non-service of summonses, however, does not constitute fraud.³² An *ex parte* decree obtained by fraud may be set aside on an application being made under O. 9, r. 13, C.P. Code, or in a separate suit, but if the question of fraudulent suppression of summonses has been decided adversely to the judgment-debtor in an application under O. 9, r. 13 the finding will operate as *res judicata* and a regular suit will not be competent.

Court asked to set aside a decree on the ground of fraud cannot examine the decree on its merits.—A Court asked to set aside a decree on the ground of fraud cannot, as if it were, sit in appeal on the judgment; the real issue for its decision is whether the decree was procured by fraud.³⁴ An unsuccessful party cannot be allowed to get round the

25. Punjab Commercial Syndicate v. Punjab Co-operative Bank, Ltd., 6 L. 512: 92 I.C. 322: 1926 L. 96.
26. Logadapatti Chinnayya v. Kotla Ramanna, 38 M. 203: 19 I.C. 579.
27. Shriniwas Sarjerao Sholapurkar v. Narayanrao Navlojirao Nimbalkar, 76 I.C. 551: 1923 B. 379.
28. Bhikaji Mahadev Gund v. Balwant Ramchandra Kulkarni, 105 I.C. 296: 1927 B. 510, thus interpreting Birch v. Birgh, (1002) P. 130 and Nanda Kumar Howladar v. Ram Jiban Howladar, 41 C. 990: 23 I. C. 337.
29. Rajani Kanta Das v. Purna Chandra Kundu, 63 I.C. 712: 1921 C. 298: 48 C. 298; Manindra Nath Mitra v. Hari Mondal, 54 I.C. 626: 24 C.W.N. 133; see Kedar Nath Das v. Hemanta Kumari Dasi, 22 I.C. 709: 18 C.W.N. 447; Lakshmi Charan Shaha v. Nur Ali, 38 C. 936: 11 I.C. 626; Vadala v. Lawes, (1890); 25 Q.B.D. 310; Abouloff v. Oppenheimer, (1862) 10 Q.B.D. 295; but see Muktamala Dasi v. Ram Chandra De, 97 I.C. 879: 1927 C. 84: 31 C.W.N. 258.
30. Muktamala Dasi v. Ram Chandra De, 97 I.C. 879: 1927 C. 84; see

- Moruful Haq v. Surendra Nath Roy, 15 I.C. 893: 16 C.W.N. 1002.
31. Mahadeb Prosad Kanaria v. Mahabir Prosad, 76 I.C. 767: 1923 C. 569; Pannalal Kuthari v. Tara Kanta Karmakar, 63 I.C. 778; Radha Kishun Rai v. Nauratan Lal, 46 I.C. 627; Gendu Nasya v. Sadi Bania, 44 I.C. 983.
32. Mahadeb Prosad Kanaria v. Mahabir Prosad, 76 I.C. 767: 1923 C. 569; Radha Kishun Rai v. Nauratan Lal, 46 I.C. 627; Narsing Das v. Bibi Rafikan, 37 C. 197: 5 I.C. 198.
33. Musthan v. Mohendra Nath Singh, 1 R. 500: 76 I.C. 794: 1924 R. 119; Yogamba Boi Ammani v. Arumuga Mudaliar, 36 I.C. 128; Khirode Chandra Roy v. Asthulla Bee, 35 I.C. 557: 20 C.W.N. 845; see also Narsing Das v. Bibi Rafikan, 37 C. 197: 5 I.C. 198; Niadar Mal v. Raunak Hussain, 29 A. 603.
34. Muktamala Dasi v. Ram Chandra De, 97 I.C. 879: 1927 C. 84; Nanda Kumar Howladar v. Ram Jiban Howldar, 41 C. 990: 23 I.C. 337; Mahomed Gulab v. Mahomed Suliman, 21 C. 612.

rule of *res judicata* and to prove that the judgment was wrong because the Court came to a wrong conclusion on the evidence before it.³⁵

Signature on summons forged.—Where the signature on the back of the summons was forged and the fact was within the knowledge of the plaintiff, it could be presumed that it was through his complicity that the return of the summons had been made and that the decree had, in consequence, been on that had been fraudulently obtained.³⁶

A stranger may plead fraud, as also a party on whom fraud has been practised, but not a party who himself has practised fraud.—In English law, a plea of fraud can, in general, be taken advantage of only by a stranger to the judgment who is in no way privy to the fraud, and not by a party; since, if the latter were innocent, he might have applied to vacate the judgment, and if guilty, he cannot escape the consequence of his own wrong.³⁷ In India, however, it has been settled by a long line of decisions that not only a stranger to a judgment may plead fraud but also a party to the judgment may prove the fraud of his adversary in obtaining the judgment, and this he may do in a collateral proceeding at the time when the judgment is pleaded or proved against him, even though he has not previously taken any step to have the judgment set aside,³⁸ and a separate suit to have it set aside has become time-barred.³⁹ But though the language of section 44 is wide enough to allow a party to set up his own fraud,⁴⁰ the rule enacted by the section must be read subject to the general principle of justice that a man cannot take advantage of his own fraud.⁴¹ Therefore, though a party to a judgment, order or decree may show that the judgment, order or decree was obtained by the fraud of his adversary, he will not be permitted to show that it was obtained by his own fraud.⁴² Thus, where a person, in order to save his property from the creditors, allows another person to obtain a fraudulent and collusive decree against himself, he will not be permitted to impeach the decree thus obtained by his own fraud, and the Court will not, in such circumstances, give him any relief.⁴³

35. Logadapatti Chinnaya v Kotla Ramanna, 38 M. 203; 19 I.C. 579.

36. Devraj v. Hara, I.L.R. (1959) (9) Raj. 167.

37. Phipson, Ev., 7th Ed., 394; Taylor, § 1713; Steph. Dig. Art., 46.

38. Nistarini Dassi v. Nundo Lall Bose, 26 C. 891 (where this subject has been exhaustively discussed); Hare Krishna Sen v. Umesh Chandra Dutt, 62 I.C. 962; 1921 P. 193 (F.B.); Kuraram Datta v. Banomali Patra, 29 I.C. 838; Bansi Lal v. Dhapo, 24 A. 242; Srirangammal v. Sandammal, 23 M. 216; Rajib Panda v. Lakhan Sendh Mahapatra, 27 C. 11; Manchharam v. Kalidas, 19 B. 321; Ahmedbhoy Hubibhoy v. Vulleebhoy Cassumbhoy, 6 B. 703; see also Prayag Kumari Debi v. Siva Prosad Singh, 93 I. C. 385; 1926 C.I.; Aswini Kumar Samaddar v. Banamali Chakrabarty, 40 I.C. 607; 21 C.W.N. 594. On the general question, when may a party

plead his own fraud, see Gudappa v. Balaji, 1941 B. 274 (F.B.).

39. Rajib Panda v. Lakhan Sendh Mahapatra, 27 C. 11, 23.

40. Ahmedbhoy Hubibbhoy v. Vulleebhoy Cassumbhoy, 6 B. 703, 716.

41. Rajib Panda v. Lakhan Sendh Mahapatra, 27 C. 11, 23.

42. Nistarini Dassi v. Nando Lall Bose, 26 C. 891, 907; Kishorbhai Revadas v. Ranchhodia Dhulia, 38 B. 427; 25 I.C. 37; Rajib Panda v. Lakhan Sendh Mahapatra, 27 C. 11; Rangammal v. Venkatachari, 20 M. 323; Yaramati Krishnayya v. Chundru Papayya, 7 20 M. 326; Varadarajulu Naidu v. Srinivasulu Naidu, 20 M. 333; Rangammal v. Venkatachari, 18 M. 378; Chenvirappa v. Puttappa, 11 B. 708.

43. Varadarajulu Naidu v. Srinivasulu Naidu, 20 M. 333; Yaramati Krishnayya v. Chundru Papayya, 20 M. 326; Rangammal v. Venkatachari, 20 M. 323; Rangammal v. Venkatachari, 18 M. 378; Chenvirappa v.

Whether a privy may plead the fraud of his predecessor in interest?—Generally, a person can neither plead his own fraud nor the fraud of his predecessor in interest through whom he claims. Thus, where a person, in order to defeat his creditors, allowed a fraudulent decree to be passed against himself and in satisfaction of the decree conveyed his property to the decree-holder, and subsequently the heirs of the judgment-debtor, alleging the fraudulent nature of the decree, sued to recover the property conveyed, it was held that they could not do so, as they claimed through the judgment debtor and could not, therefore, plead the fraud of their predecessor in interest.⁴⁴ But the rule that a privy in estate cannot set up fraud as an answer is not of general application.⁴⁵ Where the fraud practised is on a provision of the law enacted for the benefit of the privies, the privies are not stopped from pleading the fraud of their predecessors in interest.⁴⁶

COLLUSION

Collusion.—"Collusion" has been defined to be a deceitful agreement or compact between two or more persons to do some act in order to prejudice a third person, or for some improper purpose. Collusion in judicial proceedings is a secret agreement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose. It may be of two kinds: (i) when the facts put forward as the foundation of the judgment of the Court do not exist, and (ii) when they exist, but have been corruptly preconcerted for the express purpose of obtaining the judgment".⁴⁷ Where litigating parties collude, there can be no real battle but only a sham fight.⁴⁸

Separate suit to set aside the decree not necessary.—It is not necessary that a separate suit should be filed to have a decree set aside on the ground of its having been procured by collusion; the collusive nature of the decree may be shown by a party in the very proceedings in which it is given in evidence against him.⁴⁹ But in proceedings for rateable distribution under section 73, C.P. Code, it is not open to a Court to refuse rateable distribution of assets to a decree holder on the ground that his decree was obtained collusively.⁵⁰

Puttappa, 11 B. 708; for cases of transfer in fraud of creditors where this principle is applicable, see *Chenvirappa v. Puttappa*, 11 B. 708; *Honapa v. Norsapa*, 23 B. 406; *Banke Behary Das v. Raj Kumar Das*, 27 C. 231; *Kondeti Kama Row v. Nukamma*, 31 M. 485; and for cases of similar transfer where this principle is not applicable by reason of the fraud not having been accomplished, see *Pritha Das v. Hira Singh*, 63 P.R. 1893; *Govinda Kuar v. Kishun Prosad*, 28 C. 370; *Jadu Nath Poddar v. Rup Lal Poddar*, 33 C. 967; *Muhammad Farough v. Gokal Chand*, 3 P.R. 1906.

44. *Rangammal v. Venkatachari*, 18 M. 378.

45. *Shripadgouda Venkangouda v.*

Govindgouda Naraingouda, 1941 B. 77; see *Bishunath Tewari v. Mst. Mirchi*, 1955 P. 66.

46. See *Ahmedbhoy Hubibhoy v. Vulleebhoy Cassumbhoy*, 6 B. 703, 711-12.

47. *Field. Ev.*, 8th Ed. 377; *Warton's Law Lexicon*.

48. *Ahmedbhoy Hubibhoy v. Vulleebhoy Cassumbhoy*, 6 B. 703, 711.

49. *Rakshab Mandal v. Tarangini Deyi*, 62 I.C. 448; 1921 C. 332; *Aswini Kumar Samaddar v. Banamali Chakrabarty*, 40 I.C. 607; 21 C.W. N. 594; *Abdul Hakim Gazi v. Panchi Dasi*, 32 C. 849.

50. *Biswambar Biswas v. Aparana Charan Mohary*, 62 C. 715; 155 I.C. 480; 1935 C. 290 (F.B.).

A stranger to a previous judgment may plead collusion but not a party to it.—As in English law,¹ so under the Act, a stranger to a previous judgment may plead collusion.² In a case of fraud, one of the parties to a previous judgment may be innocent; but in a case of collusion, both the parties are in *pari delicto*, it is not, therefore, open to either of them to plead collusion.³ The distinction between fraud and collusion lies in this: that the party alleging fraud in the obtaining of a decree against him is alleging matter which he could not have alleged in answer to the suit in which the decree was passed, whereas a party charging collusion is not alleging new matter. He is endeavouring to set up a defence which might have been used in answer to the suit in which the decree was passed, and that he cannot be allowed to do consistently with the principle of *res judicata*.⁴

NEGLIGENCE

Section, whether exhaustive of the grounds on which a judgment, order or decree may be attacked; negligence.—This section is the only provision of law under which a judgment, or an order, or a decree which is sought to be proved with a view to establish the plea of *res judicata* can be avoided.⁵ The section is exhaustive of the grounds on which a judgment, order or decree, when admitted in evidence under any of the three sections mentioned, may be attacked without its having been previously set aside.⁶ No decree can be avoided on the ground of negligence, even if negligence be of a very serious character as negligence is not mentioned in the section.⁷ It has been held by the Privy Council that this section defines with precision the grounds on which a judgment admitted under sections 40—42 of the Act can be avoided and that since negligence is not one of the grounds of avoidance mentioned in the section, a previous judgment obtained against a minor cannot be questioned under this section on the ground of negligence of the guardian unless the negligence amounts to fraud or collusion.⁸ But this section not being definitive of the grounds on which a decree may be set aside in a separate suit the Privy Council has not decided the question whether a minor can have a decree obtained against him set aside in a separate suit on the ground of the negligence of his guardian. A Full Bench of the Bombay High Court has ruled that a minor cannot have a decree set aside mere-

1. See Phipson, Ev., 7th Ed., 394.

2. Sahib Rai v. Bahari Rai, 101 I.C. 765; 1927 A. 494; Varadarajulu Naidu v. Srinivasulu Naidu, 20 M. 333, 338.

3. Shripadgouda Venkangouda v. Govindgouda Narayangouda, 1941 B. 77; I.L.R. 1941 B. 160; Sahib Rai v. Bahari Rai, 101 I.C. 765; 1927 A. 494; Tukaram v. Sonaji, 8 I.C. 1179; Varadarajulu Naidu v. Srinivasulu Naidu, 20 M. 333, 338; Yaramati Krishnayya v. Chundru Papayya, 20 M. 326; Rangammal v. Venkatachari, 20 M. 323; Rangammal v. Venkatachari, 18 M. 373; Chenvirappa v. Putappa, 11 B. 708; Venkataramanna v. Viramma, 10 M. 17.

4. Varadarajulu Naidu v. Srinivasulu Naidu, 20 M. 333, 338.

5. Laxmi Narain Gododia v. Mohd. Shafi Bari, 1949 E.P. 141.

6. Talluri Venkata Seshayya v. Thadikonda Kotiswara Rao, 1937 P.C. 1: 64 I.A. 17.

7. Laxmi Narain Gadodia v. Mohd. Shafi Bari, 1949 E.P. 141.

8. Talluri Venkata Seshayya v. Thadikonda Kotiswara Rao, 1937 P.C. 1: 64 I.A. 17. over-ruling Karri Bapanna v. Sunkari Verramma, 1923 M. 718; 74 I.C. 218 expressly and Dhapo v. Ramchandra, 57 A. 374 and Mathura Singh v. Ramarudra Prashad Sinha, 14 P. 824 by implication.

ly on the ground of his guardian's negligence, however gross the negligence may be.⁹ But the Calcutta, the Madras and the Lahore High Courts have differed on this point from the Bombay High Court.¹⁰ It has been held by a Full Bench of the High Court of Patna that a minor can avoid, on attaining majority, a decree passed against him during minority on the ground of gross negligence on the part of his guardian-ad-litem or next friend, by bringing a subsequent suit, even if he has not succeeded in proving fraud or collusion on the part of such guardian-ad-litem or next friend.¹¹ The principle relating to negligent conduct of a former litigation by a guardian in the name of a minor is not applicable to the case of parties litigating on behalf of a public interest. The protection of minors against negligent actions of their guardians is a special one and the principle cannot be extended to cases of gross negligence by parties litigating on behalf of a public interest.¹² This section is, of course, not exhaustive of the grounds on which a decree may be set aside in a regular suit. If a compromise decree has been procured by the exercise of undue influence, it may be set aside in a separate suit brought for this purpose, though undue influence is not mentioned in section 44 as a circumstance vitiating a decree.¹³

Setting Aside Decrees on ground of Mistake.—A decree of a Court cannot be challenged in another action on the ground of mistake in its adjudication. The section allows judgments, orders or decrees, to be challenged in collateral proceedings only on ground of fraud or collusion in obtaining them, or on the ground of incompetency of the Court which delivered them. Mistake as such does not find mention in the section as a ground therefor. One of the maxims in statutory interpretation is *expressio unius est exclusio alterius* (the expression mention of one thing implies the exclusion of another). When incompetency, fraud or collusion have alone been mentioned as grounds for avoidance of decrees, the implication is that no other ground is available therefor. Mistake must, therefore, be ruled out as a ground for relief against adjudication in civil judgments, orders and decrees.¹⁴

Though under this section, a party may show that a compromise decree was obtained by fraud, it is not open to him to plead that the compromise on which the decree was based was vitiated by mutual mistake as to a material fact.¹⁵

9. Krishnadas Padmanabhrao Chandavarkar v. Vithoba Annappa Shetti, 1939 B. 66 (F.B.).
10. Mahesh Chandra v. Manindra Nath Das, 1941 C. 401: I.L.R. (1941) I. C. 477; Lalla Sheo Charan Lal v. Ramnandan Dubey, 22 C. 8; Ramalingam v. Venkatachalam, 1945 M. 374; Egappa Chettiar v. Ramnathan Chettiar, 1942 M. 384: I.L.R. 1942 M. 526; Punneyyah v. Viranna, 45 M. 425; Ananda Rao v. Appa Rao, 1925 M. 258; for the Lahore view see Nawab Iftikhar Husain Khan v. Beant Singh, 1946 L. 233 (F.B.); Sayed Mahbub Husain Shah v. Anjuman Imdad Qarza, 1942 L. 129.
11. Kamaleshya Narain Singh Bahadur v. Baldeo Sahai, 1950 P. 97: 27 P. 441 (F.B.).
12. Talluri Venkata Seshayya v. Thadikonda Kotiswara Rao, 1937 P.C. 1: 64 I.A. 17; Laxmi Narain Gadia v. Mohd. Shafi Bari, 1940 E.P. 141.
13. Shaminath Choudhri v. Ramjas, 34 A. 143: 13 I.C. 80; see also Mahesh Chandra v. Monindra Nath Das, 1941 C. 401: I.L.R. (1941) I.C. 477.
14. Vasudevan v. Raman Pillai, A.I. R. 1963 Ker. 217.
15. Smt. Krishna Subala Bose v. Dhanapati Dutta, 1957 Cal. 59.

Right under section 44 is independent of any limitation.—The right as given by section 44 has not been fettered by any limitation wheresoever and it is manifest that such a right is quite independent of the right to get a judgment or decree etc. set aside by bringing regular suit for the purpose. A decree or order can be challenged on ground of fraud in a collateral proceedings without any suit for setting aside the decree, irrespective of the time when the judgment was delivered or order or decree was passed.¹⁶

OPINIONS OF THIRD PERSONS WHEN RELEVANT

45. When the Court has to form an opinion upon a point
 Opinions of ex- of foreign law, or of science, or art, or as to
 perts identity of handwriting ¹⁷[or finger impres-
 sions], the opinions upon that point of persons specially skilled in
 such foreign law, science or art, ¹⁸[or in questions as to identity of
 handwriting] ¹⁷[or finger impressions] are relevant facts.

Such persons are called experts.

Illustrations

(a) The question is, whether the death of A was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(b) The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(c) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.

COMMENTARY

Opinion evidence in general; expert testimony.—As a general rule,

16. Tribeni Mishra v. Rampujan Mishra, A.I.R. 1970 Pat. 13.

17. Inserted by the Indian Evidence Act 1899 (5 of 1899), section 3. For discussion in Council as to whether "finger impressions" in-

clude "thumb impressions," see Gazette of India, 1898, Pt. VI, p. 24.

18. Inserted by section 4 of the Indian Evidence Act Amendment Act (18 of 1872).

the opinion of a witness on a question whether of fact or of law, is irrelevant. A witness has to state the facts which he has seen, heard or perceived, and not the conclusions which he has formed on observing or perceiving them. The function of drawing inferences from facts is a judicial function and must be performed by the Court. If a witness is permitted to state not only the facts which he has perceived but also the opinion which he has formed on perceiving them, it would amount to delegation of judicial functions to him and investing him with the attributes of a judge.¹⁹

To this general rule, however, there are some important exceptions, which are enacted in this set of sections.²⁰ When "the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it", or when "it so far partakes of the character of a science or art as to require a course of previous habit or study", the opinions of persons having special knowledge of the subject-matter of inquiry become relevant; for it is very difficult for the Court to form a correct opinion on a matter of this kind, without the assistance of such persons.²¹

It should be noted that all language necessarily involves inferences of one kind or another, and it is not every inference of a witness which is excluded as "opinion" under the Act. "In all supposed statements of fact, the witness really testifies to the opinion formed by the judgment upon the presentment of the senses".²² "There have been many cases in which ordinary witnesses have been allowed to give their opinions in evidence and they must frequently be allowed to do so. There are matters on which it is naturally impossible for any witness to give positive evidence of facts which he observed. He must, if he says anything at all, speak as to his opinion or belief, on matters which are essentially matters of opinion or are so complex or indefinite that he can only form a general opinion upon them. Thus, on questions of identity, condition, age, appearance or resemblance of persons or things, on the general character of the weather, or the general conduct of a business or of persons during a certain period, or the general character of a meeting alleged to be seditious, clearly only evidence of opinion can be given, and would in most cases be received."²³ Similarly, a witness can testify to the value of a house,²⁴ or to a person being in possession of certain property;²⁵ but it is doubtful if the witness will be permitted to say that a person is the "owner" of a property, since "ownership" is a question of legal inference to be drawn from the facts proved in the case.²⁶ A witness proving an innuendo in a libel case is merely deposing to the impression caused in his mind by the publication; such evidence is not "opinion evidence" at all.²⁷ The opinion or impression of a witness that it appeared to him

19. *Baswantrao Bajirao v. E.*, 1949 N. 66: 50 Cr. L.J. 181: I.L.R. 1948 N. 711; *State of Mysore v. Sampangiramah*, 1953 Mys. 80: 1953 Cr. L.J. 1071.

20. Sections 45—51.

21. *Taylor*, § 1418.

22. *Woodroffe, Ev.*, 9th Ed., 410.

23. *Cockle's cases and Statutes*, 4th Ed., 121, 122.

24. *Woodroffe, Ev.*, 9th Ed., 442—443, foot-note (1), 443; the evidence of a broker or surveyor can be ad-

mitted as expert testimony on a question of market value, *Secretary of State v. Sarla Devi Choudhrani*, 5 L. 227: 79 I.C. 74: 1924 L. 548; *Government of Bombay v. Karim Tar Mohomed*, 33 B. 325: 3 I.C. 273.

25. 4 B.L.R. 97 (F.B.); contra *Ishan Chunder v. Ram Lochan*, 9 W.R. 70.

26. 22 C.J. 534.

27. See *Woodroffe, Ev.*, 9th Ed., 442.

from the conduct of the mob that they had appeared there for an unlawful purpose is inadmissible to prove the object of the assembly, though statements as to what he actually saw and heard are admissible.²⁸ Expert evidence is a weak type of evidence.²⁹ As to evidence of character, see notes to section 55.

Matters for expert testimony; competency to depose as an expert.—Opinions of experts become relevant only when the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting or finger impressions. This section is, therefore, exhaustive of the matters on which expert testimony can be given, though the expression “science or art” would include almost all branches of human knowledge requiring special study, experience or training. So that a witness may be competent to depose as an expert, he must be shown to have made a special study of the subject or acquired a special experience therein. In such cases, the question is:—“Is he *peritus*? Is he skilled? Has he adequate knowledge?”³⁰ An expert is a person who has special knowledge and skill in the particular calling to which the inquiry relates.³¹ In law, and as applied to a witness, the term “expert” has a special significance; and no witness is permitted to express his opinion, unless he is an expert within the terms of section 45.³² The fact that the evidence of an expert was accepted in one case is no ground for accepting his evidence in every other case.³³

FOREIGN LAW

Foreign law.—In England, the ordinary mode of proving a point of foreign law is to call a witness specially skilled in that law; but in India it may either be proved under this section by expert testimony, or in the manner laid down in section 38 of the Act, viz., by the production of official books or reports of the rulings of the Courts of the particular country or by foreign judgments.³⁴ Foreign law is a question of fact,³⁵ with which Courts in India are not supposed to be conversant; opinions of experts in foreign law are, therefore, allowed to be admitted.³⁶ But where the foreign law is laid down in a particularly elaborate Code which is available, it is unnecessary to call expert evidence on the point of foreign law involved.³⁷ Hindu Law or Mohammadan Law as administered by the Courts of India, is neither “foreign law” nor “science or art”, but is the law of the land; and the opinions of witnesses, however learned they may

28. *Jogi Rayt v. E.*, 105 I.C. 234: 1928 P. 98: 28 Cr. L.J. 906.

29. *Melappa v. Guramma*, 1956 B. 129.

30. *United States Shipping Board v. The Ship “St. Albans”*, 131 I.C. 771: 1931 P.C. 189.

31. *Lawson on Expert Testimony*, 2nd Ed., 229.

32. *Ram Das v. Secretary of State*, 128 I.C. 441: 1930 A. 537.

33. *Baswantrao Bajirao v. E.*, 1949 N. 66: 50 Cr. L.J. 181: I.L.R. 1948 N. 711.

34. *Suganchand Bhikamchand v. Man-*

gibai Gulabchand, 1942 B. 185.

35. *Khoday Gangadara Sah v. Swaminadha Mundali*, 92 I.C. 112: 1926 M. 218; *Aziz Bano v. Mohammad Ibrahim Husain*, 47 A. 823: 89 I.C. 690: 1925 A. 720.

36. *Aziz Bano v. Mohammad Ibrahim Husain*, 47 A. 823: 89 I.C. 690: 1925 A. 720.

37. *Palaniappa Chetty v. Nagappa Chettiar*, 123 I.C. 600: 1930 M. 146: but see *The Sussex Peerage Case*, 11 C. & F. 85, 114.

be in that law, are irrelevant.³⁸ But Jewish law is foreign law.³⁹ As to the mode of proof of foreign customs and usages, see sections 48 and 49.

Competency of a foreign law expert.—A person whose knowledge of foreign law is derived solely from study without actual practice, is incompetent.⁴⁰ The witness who is called to prove a point of foreign law must be either a practising lawyer or a person *peritus virtute officii*, i.e., the holder of some official position which requires and therefore presumes a knowledge of that law. A foreign Judge, barrister, or solicitor practising in the Courts of his country is competent,⁴¹ but not a mere resident of the foreign country, not specially conversant with the law.⁴² It is not enough to show that the witness in fact knows the foreign law; he must be one who, from his position or training, is supposed to know the law.⁴³

SCIENCE OR ART

Science or art.—The expression ["science or art" should receive a liberal construction and must be taken to include all subjects on which a course of special study or experience is necessary to the formation of an opinion.⁴⁴ Thus construed the section would permit a person having special knowledge or experience of a "trade", "handicraft", "profession" or other pursuit to depose to matters concerning his particular vocation; and thus mechanics, artisans and other workmen would be competent expert witnesses in matters relating to their trades. To determine whether a particular matter is of a scientific nature or not, the test to be applied is whether the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without the assistance of experts, and whether it so far partakes of the character of a science or art as to require a course of previous habit or study in order to obtain a competent knowledge of its nature.⁴⁵ Thus, the Assistant Mint Master of the Calcutta Mint is a competent expert witness in questions relating to coins and instruments of coinage.⁴⁶ A surveyor or broker will be allowed to depose as an expert, when the Court has to form an opinion as to the value of a property;⁴⁷ though, when such expert gives no data in support of his opinion, his evidence will be of no value.⁴⁸ An excise officer who is able to distinguish liquors is an expert

38. *Aziz Bano v. Mohammad Ibrahim Husain*, 47 A. 823: 89 I.C. 690: 1925 A. 720; *Masjid Shahid Ganj v. Shiromani Gurdwara Parbandhak Committee*, 1940 P.C. 116: 21 L. 493: 67 I.A. 251: 189 I.C. 1; *Amar Nath v. Mrs. Amar Nath*, 1948 L. 126; *Moula Bux v. Charuk*, P.L.D. 1952 Sind 54.

39. *Ezekil Jacob v. Joseph Jacob*, 1946 C. 90: 48 C.W.N. 513.

40. *Bristow v. Sequeville*, (1850) 19 L.J. Ex. 289; but see *Brailey v. Rhodesia*, (1910) 2 Ch. 95; *Wilson v. Wilson*, (1903) P. 157.

41. *Phipson*, Ev., 7th Ed., 377.

42. *R. v. Naguib* (1917) 1 K.B. 359 C.C.A., but see *Vander Donckt v. Thelluson*, 8 C. & B. 812, where a foreign stockbroker was allowed to depose to a point of foreign law

relating to bills of exchange.

43. *Perlak Petroleum v. Deen*, 1924 1 K. B. 111.

44. *Steph. Dig.*, Art. 49; *Sidik v. E.*, 1942 S. 11.

45. *Taylor*, § 1418; *Woodroffe, Ev.*, 9th Ed., 447; *Mahadeo Dewanna v. Vyankammabai*, 1948 N. 287: I.L.R. 1947 N. 781: 1947 N.L.J. 478.

46. *Gilli v. E.*, 88 I.C. 818: 1925 O. 616: 26 Cr. L.J. 1232.

47. *Secretary of State v. Sarla Devi Chaudhrani*, 5 L. 227: 79 I.C. 74: 1924 L. 548; *Government of Bombay v. Karim Tar Mahomed*, 33 B. 325: 3 I.C. 273.

48. *Pribhu Diyal v. Secretary of State*, 135 I.C. 183: 1931 L. 361; *Secretary of State v. Sarla Devi Chaudhrani*, 5 L. 227: 79 I.C. 74: 1924 L. 548.

in his own department.⁴⁹ In cases arising out of the infringement of copyright, the Court, in ordinary circumstances, would get the opinion of experts by appointing them Commissioners to investigate and report on the matters in issue;⁵⁰ but it is not permissible in such cases to admit as evidence the opinion of literary gentlemen that the defendant copied from the plaintiff, as it is not a matter for expert testimony at all.¹ If the subject-matter of the inquiry does not require any special study or experience, opinion evidence will be inadmissible.² Thus, the opinion of a businessman that goods bearing certain trade marks alleged to be imitations are likely to deceive the purchasers does not amount to expert opinion on any question of science or art,³ and is therefore inadmissible. A haulage contractor who owns several lorries and has been in business for 16 years, and also fits a large quantity of tyres every month for other companies, is an expert on the quality, wear and usage of tyres.⁴ Gambling cannot be considered to be either an art or a science so as to entitle a Police Officer to go into the witness-box and speak as an expert that in his view, based on experience in other cases, certain documents are instruments of gaming. Such opinion may, however, become relevant under section 49.⁵ Generally speaking it is not permissible to call a witness to explain to the Court what a document means unless the witness is an expert,⁶ or the document contains words or terms used in particular districts or by particular classes of people and the witness has special means of knowledge of them.⁷ Telephony is a science or art and the witnesses' knowledge of the telephone and of engineering generally places them in a special position and makes them competent to express an opinion upon articles and matters which are largely in use in the department of the telephone and of engineering generally".⁸

Mode of making expert opinion evidence.—Under this section, an expert has to state his opinion in Court and must be examined and cross-examined like any other witness. While giving evidence, the expert may refer to any professional treatise or any memorandum which he may have prepared at a time when the facts on which his opinion is based were fresh in his memory,⁹ though the memorandum itself is not evidence and no facts can be taken from it.¹⁰ If the expert whose opinion is intended to be proved is dead or cannot be produced without an unreasonable amount of delay or expense, his opinion may be proved by the production of any treatise commonly offered for sale.¹¹ The Court itself may, on all matters of science or art, resort for its aid to appropriate books or documents of reference, and well-known scientific works may be read during trial as evidence of experts.¹² An expert may be examined

49. *Ram Karan Singh v. E.*, 154 I.C. 341; 1935 N. 13: 36 Cr. L.J. 511.

50. *Sita Nath Basak v. Mohini Mohan Singh*, 81 I.C. 754; 1924 C. 595.

1. *Deeks v. Wells*, 142 I.C. 815; 1933 P.C. 26.

2. 1 Bom. H.C.R. 148.

3. *Macdonald & Co. v. Holland & Moss*, 41 I.C. 539.

4. *Globe Automobile Co., v. K.A.K. Master*, (1935) 157 I.C. 12.

5. *E. v. Harilal Gordhan*, I.L.R. 1937 B. 670; 1917 B. 385; 171 I.C. 282; 38 Cr. L.J. 1047.

6. *E. v. Nathalal Vanmali*, 41 Bom.

L.R. 518

7. Section 49.

8. *Bachraj Factories, Ltd. v. Bombay Telephone Co. Ltd.*, 1930 S. 245.

9. Section 159.

10. *Roghuni Singh v. E.*, 9 C. 455.

11. Section 60; as to the mode of using a text book, see *Grande Venkata Ratnam v. Corporation of Calcutta*, 46 I.C. 593; 19 Cr. L.J. 753.

12. Section 57; *Hurry Churn Chuckerbutty v. E.*, 10 C. 140. In the matter of the Steamship "Drachenfels", 27 C. 860 the Court referred to the Imperial Gazetteer and a

on commission under Chap. XL of the Criminal Procedure Code, or Order XXVI of the Civil Procedure Code; and under O. XXXIX, r. 7 of the latter Code, the Court may authorize an expert to take samples or to make any observation or experiments for the detention, preservation or inspection of any property which is the subject-matter of the suit. The Court may, for its own guidance and information, order independent inquiries and reports to be made, or experiments to be tried, by experts of its own selection.¹³ The deposition of a medical expert taken and attested by a Magistrate in the presence of the accused or taken on commission, and the report of a Chemical Examiner may be treated as evidence without calling the medical expert or the Chemical Examiner as a witness.¹⁴ Apart from these special statutory provisions, however, a report, certificate or letter of an expert cannot be considered as evidence, if its author has not been produced in Court to prove it.¹⁵ But if a party has accepted the report of an expert as evidence without the expert being examined in Court, he cannot object to the admissibility of the report in appeal.¹⁶ Where the lower Court has based its decision on the opinion of an expert contained in a report, though he has not given sworn testimony in support of the report, the objection to such evidence will not be permitted to be taken for the first time in revision.¹⁷

Expert should be examined in the presence of the accused and not on commission.—It is not satisfactory to examine an expert on commission in criminal cases. The evidence of an expert has always to be carefully weighed and much more so when the expert has been examined on commission and not in the presence of the accused. The value of expert evidence, when given on commission, is considerably reduced.¹⁸

MEDICAL EXPERTS

Competency of a medical expert.—It is only the person who has made medicine as his special study, or who has special experience of it, who can depose as a medical expert. What degree of study or expe-

well-known work on Topography, and in *Martand Rao v. Malhar Rao*, 55 C. 403: 55 I.A. 45: 107 I.C. 7: 1928 P.C. 10, the Privy Council referred to official reports regarding some historical matters.

13 *Marconi v. British Co.*, Times Dec. 15, 1910, cited in Phipson. Ev., 7th Ed., 374; see *Sita Nath Basak v. Mohini Mohan Singh*, 81 I.C. 754: 1924 C. 595, where it has been remarked that in infringement of copyright cases experts should be appointed Commissioners.

14 Sections 509 & 510, Cr. P. Code, but see *Aishan Bibi v. E.*, 15 L. 310: 152 I.C. 206: 1934 L. 150: 36 Cr. L.J. 11; *Happu v. E.*, 146 I.C. 1089: 1933 A. 837: 35 Cr. L.J. 280; *Tulsiram Kanu v. State*, 1954 S.C. 1: 1953 S.C.J. 612: 1954 Cr. L.J. 225.

15 *Perumal Mudaliar v. South Indian Railway Co., Ltd.*, I.L.R. 1937 M.

764: 1937 M. 407: 171 I.C. 259; *Bhoore Singh v. Karan Singh*, 1935 A. 142; *Ram Autar Shukul v. Baldeo Shukul*, 11 P. 782: 140 I.C. 895: 1932 P. 352; *Ahila Manaji v. E.*, 47 B. 74: 84 I.C. 643: 1923 B. 183: 26 Cr. L.J. 339; *Pitain v. Baboosingh*, 79 I.C. 641: 1924 N. 183; *Raghunath Mody v. The Kurseong Municipality*, 76 I.C. 394: 1923 C. 561: 25 Cr. L.J. 170; *Peary Lal v. E.*, 75 I.C. 148: 1923 A. 601: 24 Cr. L.J. 900; *Rampear Rai v. Bhogia*, 8 I.C. 713; *Sris Chandra Nandy v. Sm. Annapurna Ray*, 1950 C. 171; *Coral Indira Gonsalves v. Joseph Prabhakar Iswariah*, 1953 M. 858: 1953 1 M.L.J. 591.

16 *Dil Muhammad v. Sain Das*, 100 I. C. 1927 L. 396.

17 *Karam Din v. Ata Muhammad*, 150 I.C. 357: 1934 L. 230.

18 *Nur Din v. E.*, 108 I.C. 369: 1928 L. 533: 29 Cr. L.J. 377.

rience would qualify a person to depose as a medical expert is for the Court to decide, but there are recorded cases in which even hospital students, dressers and unqualified practitioners have been allowed to depose as experts.¹⁹ An expert in mental diseases is a competent witness in cases involving a question of insanity.²⁰ As to the Court itself forming an opinion on a question of medicine by reference to medical works, see *E. v. Purna Chandra Ghose*.²¹

Value of medical expert testimony.—In *Lachman Singh v. The State* their Lordships of the Supreme Court²² held after considering the other evidence in the case that the finding of the doctor did not necessarily affect the prosecution case as to the time of the occurrence and the necessity for full data to reach a proper conclusion based upon the condition of the digestion was emphasised. In *Doddamani v. State*²³ the High Court held that the opinion stated by the medical officer was at best an opinion and could not be taken as contradicting the positive evidence of the witnesses as to when the deceased ate his last meal and when he was stabbed. In *Mukanda v. State* the Rajasthan High Court held that the medical estimate did not negative the other evidence about the time when the victim was belaboured.²⁴ Expert evidence should be approached with considerable care and caution.²⁵ An expert witness is naturally biased in favour of the party who calls him; however impartial he may wish to be, he is likely to be unconsciously prejudiced in favour of the side calling him. Besides, an expert is often called by one side simply and solely because it has been ascertained that he holds views favourable to its interests.²⁶ "In these Courts instances not infrequently occur in which medical men, not of standing or distinction, give medical certificates, for instance, for the purpose of obtaining the adjournment of a case on grounds which after investigation turn out to be wholly insufficient to justify the exemption of a witness from attendance, thereby forsaking their position as men of science in order to oblige a patient. But complaisance and the pursuit of science go ill together."²⁷ The evidence of a medical man or other skilled witness, however eminent, as to what he thinks may or may not have taken place under a particular combination of circumstances, however confidently he may speak, is ordinarily a matter of mere opinion. Human judgment is fallible, human knowledge is limited and imperfect. New and previously unobserved phenomena which, till they have been recorded, are supposed to be impossible are constantly being noticed.²⁸

19. Halsbury, Vol. 13, para. 661.

20. *Deorao v. E.* 1946 N. 321.

21. 83 I.C. 631; 1924 C. 611; 26 Cr. L. J. 71.

22. *Lachman Singh v. State*, 1962 Cr. L.J. 863.

23. *Doddamani v. State*, (1961) 1 Cr. L.J. 120.

24. *Mukanda v. State*, 1957 Cr. L.J. 1187.

25. *Panchu Mondal v. E.*, 1 C.L.J. 385.

26. *Diwan Singh v. E.*, 144 I.C. 331; 1933 L. 561; 34 Cr. L.J. 735; *Hari Singh v. Lachmi Devi*, 59 I.C. 220; 1921 L. 126; but see *Lila Sinha v. Bijoy Pratap Deo Singh*, 87 I.C. 534; 1925 C. 762 where Page, J., observes: "There appears no reason

why a scientific witness should not be a witness of one or more or all of the parties to a legal proceeding. To a professional man, it matters not which party calls him as a witness. What is of concern to a medical witness is the accuracy of the scientific opinion which he expresses, not the party by which such evidence is tendered."

27. *Lila Sinha v. Vijoy Pratap Deo Singh*, 87 I.C. 534; 1925 C. 768, per Page, J.

28. *Gupta v. E.*, 1 R. 290; 76 I.C. 425; 1924 R. 17; 25 Cr. L.J. 185; *Hari Singh v. Lachmi Devi*, 59 I.C. 220; 1921 L. 126; *Q. v. Ahmad Ali* 11 W.R. Cr. 25.

The medical evidence does not itself prove the prosecution case. Its value is only corroborative. It can prove that the injuries could or could not have been caused in the manner alleged and the death could or could not have been caused by the injuries.²⁹ Where there is a conflict between the medical evidence and the oral testimony of witnesses, the evidence can be assessed only in two ways. The Court can either believe the prosecution witnesses unreservedly and explain away the conflict by holding that witnesses have merely exaggerated the incident, or rely upon the medical evidence and approach the oral testimony with caution testing it with medical evidence. The first method can be applied only in those cases where the oral evidence is above reproach and creates confidence. Where the evidence is not of that character and the medical evidence is not open to any doubt or suspicion, the only safe and judicial method of assessing evidence is the second method.³⁰ The opinion of an expert witness, not based on any well defined inexorable laws of nature, cannot be taken as decisive, especially where there is direct evidence opposed to it. If the opinions of equally competent expert witnesses conflict on a particular point, the Court ought to accept that opinion which is not in conflict with the direct evidence.³¹ A court is not entitled to discard the direct evidence of credible and unimpeachable witnesses deposing to things observed with their own eyes, merely on the opinion of a medical witness.³² Where there is testimony of a considerable body of trustworthy and respectable witnesses who were able to observe facts and draw inferences for themselves, the opinion of medical men as to what should have been the probable state of the testator should not outweigh and prevail over such testimony.³³ Where there is strong direct evidence of murder having been committed at a certain place, but no blood is detected by the chemical examination of the earth, leaves and grass taken from the alleged place of occurrence, the Chemical Examiner's report that no blood was detected in the earth, leaves and grass sent to him for examination, is not sufficient to rebut the strong evidence as to the place of occurrence.³⁴ If the general condition and state of health of a person is in issue and it is sought to prove that he was unable to write on account of a disease, isolated extracts from medical works ought not to be preferred to the evidence of a medical man examined with reference to the symptoms deposed to by the witnesses.³⁵ Text books are admissible, but their use without the assistance of experts might lead to error; hence, if they are used to contradict an expert, the passages relied on in them should be put to him.³⁶ The opinion of the medical man who did not observe the fact himself but based his opinion on the facts deposed to by other witnesses is not of much weight when compared with the evidence of the doctors who personally attended the patient.³⁷ The ex-

29. *Sunil Chandra Roy v. State*, 1954 C. 305.

30. *Thakur v. State*, 1955 A. 189.

31. *Pleydell v. E.*, 96 I.C. 641: 1926 L. 313: 27 Cr. L.J. 977.

32. *Shiddubai Rudragauda Desai v. Nilapagauda Bharmagauda* 83 I.C. 616: 1924 B. 457; *Q. E. v. Wazir Ali*, 9 A.W.N. 74; *Ghulam v. Crown*, P.L.D. 1950 L. 90.

33. *Saradindu Nath Rai Chaudhuri v. Sudhir Chandra Das*, 50 C. 100: 69 I.C. 48: 1923 C. 116.

34. *Haseenulla Sheikh v. E.*, 83 I.C. 485: 1924 C. 625: 26 Cr. L.J. 5

35. *Rawat Sheo Eahadur Singh v. Beni Bahadur Singh*, 51 I.C. 419.

36. *Grande Venkata Ratnam v. Corporation of Calcutta*, 46 I.C. 593: 19 Cr. L.J. 753: opinion formed by reference to medical books and without trained assistance is valueless, *E. v. Purna Chandra Ghose*, 83 I.C. 631: 1924 611: 26 Cr. L.J. 71.

37. *Hari Singh v. Lachhmi Devi*, 59 I.C. 220: 1921 L. 126; *In the goods of Gopessuar Dutt*, 39 C. 245: 13 I.C. 577; *Baswantrao Bajirao v. E.*, 1949 N. 66.

pert should put before the Court all the materials which induced him to come to his conclusion, so that the Court may form its own judgment on those materials.³⁸ The opinion of a Court, itself untrained in medicine, and without expert assistance, on questions of medicine is valueless.³⁹ The opinion of a doctor is entitled to great weight but it may be discarded if there are good grounds for doing so.⁴⁰ The opinion of a medical witness, however eminent he may be, must not be read as conclusive of the fact which the Court has to try. Such opinion may be invited in exceptional circumstances where there is no dispute as to facts or their interpretation, but it must be considered by the Court as nothing more than relevant.⁴¹ See notes to this section under the heading "value of expert testimony in general."

Use of the evidence of a Medical Expert.—Per, S. K. Das and Sarkar J.J.: When a medical man is called as an expert, he is not a witness of fact, and his evidence is not direct evidence of how an injury in question was caused. He only gives his opinion as to how that injury in all probability was caused. The value of such evidence lies only in the extent to which it supports and lends weight to the direct evidence of eye-witnesses, or contradicts that evidence and removes the possibility that the injury in question could take place in the manner alleged by those witnesses. If the evidence of an eye-witness as to how an injury was caused is disbelieved by the Court, the question of corroboration to that evidence does not remain, and in such a case the evidence of a medical expert as to how that injury could be caused ceases to have any significance. **Per Hidayatullah, J.:** A medical witness who performs a **post-mortem** examination is a witness of fact, though he also gives opinion on certain aspects of the case. The value of his evidence does not lie in merely serving as a check upon the testimony of eye-witnesses. It is also independent testimony, because it may establish certain facts, quite apart from the other oral evidence. Quite often, it is direct evidence of the facts found upon the person of the victim, and it is wrong to say that it is only opinion evidence. For example, from the marks of tattooing found on the body the expert can say about the range from which a shot was fired, and from the depth and size of a wound he can speak about the nature of the weapon used and the force which was employed.⁴²

Medical opinion on the nature of injuries.—A medical witness should merely describe the nature of the injury; it is not his province to say whether the injury is grievous or not.⁴³

Medical evidence.—Injury report is an admissible piece of evidence in proof or disproof of the theory of accident.⁴⁴

Medical opinion as to age.—Medical evidence as to the age of a person merely renders probable or improbable the other evidence in the

38 Titli v. Jones, 56 A. 428; 153 I.C. 733; 1934 A. 273; see also Baswantrao Baji Rao v. E., 1949 N. 66; 50 Cr. L.J. 181; I.L.R. 1948 N. 711.
39 E. v. Purna Chandra Ghose, 83 I.C. 631; 1924 C. 611; 26 Cr. L.J. 71.
40 Abu Pramanik v. E., 1942 C. 239; 199 I.C. 610; 42 Cr. L.J. 565; 74

C.L.J. 423
41 Baswantrao Bajirao v. E., 1949 N. 66.
42 Nagindra Bala Mitra v. Sunil Chandra Roy, 1960 Cr. L.J. 1020.
43 1885 A.W.N. 296. The practice is against this view.
44 Bisipati Padhan v. State, 1969 Cr. L.J. 1517.

case as to that person's age.⁴⁵ Although such evidence is valuable yet it is not by itself sufficient to fix the exact age.⁴⁶ Where a doctor forms his opinion as to the age of a person, "judging by his appearance, his voice and his teeth", no weight can be attached to such evidence.⁴⁷ However, it has been held that the ossification test is no doubt a surer test for determining age. But the opinion of a doctor as to age based on other factors should not be brushed aside merely because he did not conduct the ossification test.⁴⁸ It cannot possibly be said that a doctor's opinion as to a person's age is not entitled to any greater weight than that of any other person. Even if the indications from which age can be inferred are known to a layman, a layman is not in a position, as a medical man is, to examine a person with a view to discovering the presence or absence of those indications.⁴⁹ Medical evidence as to age cannot stand against the evidence of municipal register of births.⁵⁰

Proof of age of girl.—Kidnapping or abducting a female—Age of girl. Proof—Entry in school certificate not reliable with implicit faith as against medical evidence. Test of epiphyses on basis of fusion being scientific test would be acceptable. If there be conflicting evidence as to age, benefit of uncertainty as to age of the girl should be given to accused.¹

When the age of a person in respect of whom an offence has been committed is in question, the only sure proof of that person's age is the birth certificate. However a birth certificate is often not available in this country, and for the purpose of arriving at its conclusion as to the age of a person, the Court has to rely mainly upon the opinion of the medical expert, together with such other evidence as may be available, such as, the testimony of near relatives and of persons who were present at the birth. If the opinion of a doctor as to the age of a person is based upon careful physical examination of the person, and the recognised pointers and indices for determining age, such as, the stage of ossification, and that evidence is supported by the evidence of relatives, and in the cross-examination of the prosecution witnesses nothing has come out which throws a doubt on their testimony, the Court would be justified in relying upon such evidence for the purpose of determining the age of a person.²

It has been pointed out in *Chathu v. Govindan Kutty* that on the question as to the age of a girl alleged to be taken from the custody of the father, the Magistrate was not right in preferring the opinion of the radiologist to the positive evidence furnished by the municipal birth register, the school admission register and the evidence of the girl's father, particularly when medico-legal opinion is that owing to variations

45. *Sripal Singh v Jagdish Narayan*, 56 I.C. 313.

46. *Bishnath Prasad v. E.*, 1948 O. 1: 48 Cr. L.J. 54? 230 I.C. 144.

47. *Mahomed Syedol Ariffin v. Yeoh Ooi Gark*, 43 I.A. 256: 39 I.C. 401: 1916 P.C. 242; see also *E. v. Qudrat*, I.L.R. 1939 A. 871: 185 I.C. 271; distinguished in *Abdullah v. Mst. Zulekha*, P.L.D. 1950 Peshawar 19.

48. *Anam Swain v. State*, 1954 Orissa 33: 1954 Cr. L.J. 132.

49. *Nasrullah v. E.*, 147 I.C. 759 (2): 1934 O. 32: 35 Cr. L.J. 498; but see *E. v. Qudrat* I.L.R. 1939 A. 871: 185 I.C. 271.

50. *Mt. Zaitoon v. E.*, 1946 S. 132.

1. *Raunki v. State*, 1969 Cut. L.J. 666: 72 Punj. L.R. 332.

2. *Sidheswar Ganguly v. West Bengal*, 1958 Cr. L.J. 273.

in climatic, dietic, hereditary and other factors affecting the people of different States of India, it cannot be reasonably expected to formulate a uniform standard for the determination of the age by the extent of ossification and the union of epiphyses in bones.³

Opinion of experts—post-mortem report.—Evidentiary value as to age of injuries.—Doctor's evidence regarding the age of injuries cannot be of much reliance if he has failed to mention the age in the report. Besides it is difficult for a doctor to give the exact age of injuries. Hence Court cannot fix the time of occurrence on the basis of opinion of the doctor.⁴

Medical report or certificate.—Medical certificates are inadmissible being the worst form of hearsay evidence.⁵ So that a medical report or certificate may be evidence of its contents, it must be proved by calling and examining its writer.⁶ As to the practise of giving false certificates to litigants for the purpose of obtaining adjournments, see the reports of Page J., in *Lila Sinha v. Bijay Pratap Deo Singh*.⁷

Doctor's endorsement regarding soundness of mind.—Evidence of medical experts—endorsement of Registrar under Section 35, Registration Act as to soundness of mind of executant of deed of adoption including opinion of medical expert. Failure to give direct oral evidence under section 60 though medical expert was alive. Opinion of medical expert cannot be considered.⁸

Scope—Expert evidence as to mental condition of a person.—Where the medical officer of the mental Hospital, who is called to give evidence as to the unsoundness of mind of the accused, admits that he is not in a position to state as to what was the mental condition of the accused on the date of the occurrence (offence) nor as to whether the accused was suffering from any such disease prior to that date and his opinion is only a conjecture or presumption based on the facts heard by him, no weight can be attached to it as it cannot be held to be the opinion of an expert.⁹

Workmen's Compensation Act.—Medical evidence is opinion evidence and it is only with regard to the physical aspect of the injuries that the opinion of a medical witness is relevant and admissible as the opinion of an expert. But in cases dealt with under the Workmen's Compensation Act, medical opinion is valueless to adjudge the loss of earning capacity, which alone would be the crucial issue in the case. The utmost that a medical witness can give is to give the percentage of the loss of the normal physical capacity or power; but it has no relation to the loss of

3 Chathu v. Govindan Kutty, 1959 Cr. L.J. 637.

4 Basudeo Mahto v. State, 1970 Pat. L.J.R. 376.

5 Sris Chandra Nandy v. Sm. Annapurna Ray, 1950 C. 173.

6 Ahila Manaji v. E., 47 B. 74: 84 I.C. 643: 1923 B. 183: 26 Cr. L.J. 339; Rampear Rai v. Bhogia, 8 I.C. 713; Sris Chandra Nandy v. Sm. Annapurna Ray, 1950 C. 173; C.J. Balaram v. Rukmannamma, 1953 Hyd. 209; Jeevandas Ibji v. Jadeja Karubha Dujajee, 1953 Kutch. 7;

Coral Indira Gonsalves v. Joseph Prabhakar Iswariah, 1953 M. 858: 1953 1 M.L.J. 591; see Keema v. Ramoo, 49 P.R. 1866 Cr.; Q. v. Kaminee Dossee, 12 W.R. Cr. 25; Chintamonee Nye, 11 W.R. Cr. 2; Ali Akbar v. Java Bengal Line, 1937 C. 697.

7 87 I.C. 534: 1925 C. 768.

8 Smt. Gopi v. Madanlal, A.I.R. 1970 Raj. 190.

9 State v. Jose Gaspar Norouha, 1971 Cr. L.J. 36.

physical capacity. It is therefore wrong to treat his evidence not only as relevant but as decisive on the question of the loss of earning capacity.¹⁰

Accident—Loss of expectation of Life—Proof—Medical Evidence—Admissibility.—Loss of expectation of life is an item of damage only when injuries sustained are such which lead to the curtailment of the normal expectation of life of the injured person. Where the injured person himself such as plaintiff, some evidence possibly of medical men must be led if he claims damages for loss of expectation of life to show that the injury has shortened his normal expectation of life. Medical evidence in such cases will be speculative and like other sworn testimony may turn out to be incorrect, and, therefore, some caution may be necessary before accepting their evidence.¹¹

Chemical Examiner's report.—In an Allahabad case it has been ruled, perhaps too broadly, that the Chemical Examiner's report is not evidence of any fact whatsoever, as the Chemical Examiner is not examined on oath and is not subjected to cross-examination.¹² This broad proposition has not been subscribed to by the Lahore High Court.¹³ In view of the clear provisions of section 510, Cr. P. Code, which makes such report admissible, it has been held by the Supreme Court that in ordinary circumstances there would be nothing wrong in taking reports of the Chemical Examiner and the Imperial Serologist on record without examining these persons as witnesses, as permitted by the Criminal Procedure Code. When, however, there is difference of opinion mere production of reports is not sufficient.¹⁴ The Chemical Examiner must state in his report the grounds of his opinion, so that the report may take the place of his *viva voce* testimony in Court.¹⁵

Differing reports from Chemical Examiner and Imperial Serologist—Duty of prosecution.—When there is a difference of opinion in the reports of the Chemical Examiner and the Imperial Serologist, the duty to explain the difference is on the prosecution and the mere production of the report does not, under the circumstances, prove anything which can weigh against the appellant. The effect of the first document, which itself shows two different results is practically nullified by the second document. In this unsatisfactory state of the evidence, the Sessions Judge was right in holding that both in the matter of the production of the axe and on the question of blood being found on the axe, the evidence is unreliable and cannot be considered as evidence to prove the guilt of the appellant.¹⁶

Hypothetical questions.—A witness deposes as a pure expert when he offers his opinion on a pure question of science or art. But the opinion of an expert is always based on facts which either the expert noticed himself or which are stated by the witnesses at the trial. When, therefore, a person states his opinion as well as the facts which he noticed and on which his opinion is based, his opinion is pure expert testimony; his

10 Kalidas v. Mondal, A.I.R. 1957 Cal. 660, 662.

11 Vinod Kumar v. Ved Mitra, 1970 M.P.L.J. 306; 1970 Jab. L.J. 504

12 Happu v. E., 146 I.C. 1089; 1933 A. 837; 35 Cr. L.J. 280.

13 Aishan Bibi v. E., 15 L. 310; 152 I.C. 206; 1934 L. 150; 36 Cr. L.J. 11.

14 Tulsiram Kanu v. State, 1954 S.C. 1: 1953 S.C.J. 612; 1954 Cr. L.J. 225.

15 Gajrani v. E., 144 I.C. 357; 1933 A. 394; 34 Cr. L.J. 754; Ramsingh v. State, 1952 R.L.W. 269; I.L.R. 1952, 2 Raj. 93

16 Tulsiram Kanu v. The State, 1953 S.C.J. 612; 1954 Cr. L.J. 225.

statement concerning the facts on which that opinion is founded is not the statement of an expert but that of an ordinary witness. If, however, the expert did not himself notice the facts on which opinion has to be formed, they have to be proved by other evidence, and the expert can be asked to state his opinion only on the assumption that the Court considers those facts as having been proved in the case.¹⁷ In such cases, therefore, the question must always have a hypothetical form, and the expert should not be asked to give his opinion as to the existence, or otherwise of the facts stated by the other witnesses, since it is for the Court to decide whether or not those facts have been established. A medical man who has seen, and made a **post mortem** examination on, a corpse can state the number, the position and extent of the injuries which he has noticed and can also offer his opinion as to the manner in which those injuries must have been caused and as to the cause of death.¹⁸ In describing the number, position and extent of the injuries, he is not deposing as an expert; but the opinion which he has formed as to the weapon by which those injuries must have been caused and as to the cause of death is pure expert testimony. If, therefore, the medical man has not himself examined the corpse and noticed the injuries, the condition of the corpse and the nature of the injuries have to be proved by other evidence; and the medical man can be asked his opinion as to the cause of death and as to the manner in which the injuries must have been received, on the assumption that the condition of the corpse and the nature of the injuries are correctly described by the other witnesses.¹⁹ An expert should not be asked questions which involve determination of the truth or otherwise of the facts stated by the other witnesses. Thus, the question "you have heard the evidence in the case, state your opinion as to the cause of the death of the deceased" is an improper question, since the answer to it involves a determination of the question whether the facts, e.g., the position, the number and the extent of the injuries and the general condition of the corpse, described by the other witnesses are true or not. Similarly, the question "you have heard the evidence for the prosecution and the defence; state whether in your opinion the prisoner, at the time he committed the act, was of an unsound mind", is an improper question.²⁰ But a medical man who has been present in Court and heard the evidence may be asked whether the facts, assuming them to be true, show a sane or insane mind.²¹ The opinion and conclusions of a skilled person on proved facts are receivable in evidence, provided the witness has made a special study of the subject or acquired a special experience therein. The

17. *United States Shipping Board v. The Ship "St. Albans"*, 131 I.C. 771: 1931 P.C. 189; *Rawat Sheo Bahadur Singh v Beni Bahadur Singh*, 51 I.C. 419; see also *Secretary of State v. Sarla Devi Chaudhrani*, 5 L. 227: 79 I.C. 74: 1924 L. 548; but see *In the goods of Gopessuar Dutt*, C. 245: 13 I.C. 577.

18. *Roghuni Singh v. E.* 9 C. 455.

19. *Raghuni Singh v. E.*, 9 C. 455; *O.E. v. Mehar Ali Mullick*, 15 C. 589; see *Mehr Ilahi v. E.*, 12 I.C. 93: 12 Cr. L.J. 485, where two surgeons gave their opinion as to the cause of death on **post mortem symptoms described by a**

third surgeon; *Monosseh Jacob Monosseh v Shapurji Hormusji Harver*, 10 Bom. L.R. 1004, where it is remarked that the Court should first find the facts and then apply to such facts the various expert opinions.

20. See *In the goods of Gopessuar Dutt*, 39 C. 245: 13 I.C. 577: where it is remarked that it is better that the expert should hear the evidence as to which he is asked his opinion than that he should give his opinion on a copy of the deposition.

21. *In re Sankoppa Shetty*, 1941 M. 326: 194 I.C. 332: 42 Cr. L.J. 558.

question in such cases is whether the witness is skilled, whether he has adequate knowledge.²²

Hypothetical questions to an expert.—An expert is entitled to answer all hypothetical questions put to him. The only safeguard which the Court must apply is that the hypothesis is correctly put to the expert.²³

Chances of a man falling out of a window.—The question can only be put as a matter of convenience and not of right, the correct course being to put the facts to the witness hypothetically, asking him to assume one or more of them to be true and to state his opinion upon them. In a case a medical witness was asked in his evidence-in-chief the following question: "Supposing an individual 5 ft. 3½ inches tall was standing near a window the height of the sill whereof was 3 ft. 4½ inches from the floor level and there was a parapet and the combined width of the sill and the parapet was one foot ten inches, what are the chances of the man falling out of the window. The question was disallowed because it was not for an expert to tell the Court what would be the chances of a man falling out of the window from which the assured was said to have fallen out."²⁴

HANDWRITING EXPERTS

Handwriting experts.—Handwriting is a useful test of identity. "Experiments and observation have disclosed the fact that there are certain general principles which may be relied upon in questions pertaining to the genuineness of handwriting. For instance, it is asserted that in every person's manner of writing there is a certain distinct prevailing character which can be discovered by observation, and, being once known, can be afterwards applied as a standard to try other specimens of writing, the genuineness of which is disputed. Handwriting, notwithstanding it may be artificial, is always, in some degree, the reflex of the nervous organization of the writer. Hence, there is in each person's handwriting some distinctive characteristic which, as being the reflex of his nervous organization, is necessarily independent of his own will, and unconsciously forces the writer to stamp the writing as his own."²⁵ "By nature and habit individuals contract a system of forming letters which gives a character to their writing as distinct as that of the human face."²⁶ "Manifested as are the points of difference in the infinite variety of nature in which one man differs from another, there is nothing in which men differ more than in handwriting."²⁷

Competency of handwriting expert.—Under this section it is only the opinion of a person specially skilled in questions relating to the identity of handwriting, which is relevant. It is, therefore, for the party, who produces a person as an expert witness, to show that the witness possesses

22. United States Shipping Board v. The Ship "St. Albans", 131 I.C. 771: 1931 P.C. 189.

23. Bai Diva v. S.C. Mills, 1956 Bom. 424.

24. Ranjanibai Jamnadas Champsey v. New India Assurance Co. Ltd., 1956 Bom. 633, 636.

25. Rogers on Expert Testimony, 290,

292, cited in Woodroffe, Ev., 9th Ed. 449.

26. Lawson, Expert and Opinion Evidence, 2nd Ed., 327-28.

27. Cockburn, C.J., in his address to the jury in the Tichborne Trial, quoted in Woodroffe, Ev., 9th Ed., 449.

the requisite skill.²⁸ An expert is no more than a person possessing peculiar skill and knowledge upon the subject-matter that he is required to give an opinion upon.²⁹ What degree of study, training or experience amounts to peculiar skill is very difficult to define, and no hard and fast rule can be laid down. Any person who, from his circumstances and employment, possesses special means of knowledge, has given the subject particular attention and is more than ordinarily conversant with its details will be considered specially skilled for the purposes of this section. "Writing engravers, lithographers, tellers, cashiers and other officers of banks, post office officials, book-keepers and cashiers of commercial houses"³⁰ have been permitted to testify as experts. In an English case, a solicitor "who had for some years given considerable attention to the subject and had several times compared handwriting for purposes of evidence, though never testified as an expert,"³¹ was held competent; and, in a Bombay case, a solicitor himself studied a disputed will for 128 hours and satisfied the Court that the will was a forgery,³² It should be noted, however, that the higher or lower qualifications of an expert merely affect the weight and not the strict relevancy of his opinion.

Mode of proving a writing genuine or forged. Sections 45, 47 and 73. Modes of proving handwriting.—Handwriting may be proved on admission of the writer, by the evidence of some witness in whose presence he wrote. This is direct evidence and if it is available the evidence of any other kind is rendered unnecessary. The Evidence Act also makes relevant the opinion of a handwriting expert (Section 45) or of one who is familiar with the writing of a person who is said to have written a particular writing. Thus besides direct evidence which is of course the best method of proof, the law makes relevant two other modes. A writing may be proved to be in the handwriting of a particular individual by the evidence of a person familiar with the handwriting of that individual or by the testimony of an expert competent to make the comparison of handwritings on a scientific basis. A third method (Section 73) is comparison by the Court with a writing made in the presence of the Court or admitted or proved to be the writing of the person.³³

The proof of the genuineness of a document is proof of the authorship of the document, and is proof of a fact like that of any other fact. The evidence relating thereto may be direct or circumstantial. It may consist of the direct evidence of a person who saw the document being written or the signature being affixed. It may be proof of the handwriting of the contents, or of the signature by one of the modes provided in Sections 45 and 47. It may also be proved by the internal evidence afforded by the contents of the document. This last mode may be of value, where the disputed document forms part of a link in the chain of correspondence, some links of which have already been proved. In such a

28. Chet Ram v. Jogi Ram, 127 I.C. 368; 1930 L. 386; Hari Chintawan Dikhhit v. Moro Lakshman, 11 B. 89, 101; see however, Shankarrao Gangadhar v. Ramji Harjivan, 28 B. 58; a case under section 47; see also Batahu Jha v Parmeshwar Rai, 64 I.C. 234.

29. Lawson, Expert and Opinion Evi-

dence, 2nd Ed., 453.

30. Woodroffe, Ev, 9th Ed., 450.

31. R. v. Silverlock, (1894) 2 Q.B. 766.

32. Dahibai v. Soonderji Damji, 31 B. 430

33. Fakhruddin v State of Madhya Pradesh, 1967 M.P.L.J. 473; 1967 Mah. L.J. 571.

situation, the person, who is a recipient of the document is in a position to speak to its authorship.³⁴ The writing with which the disputed writing is to be compared must, if not admitted, be proved to be genuine i.e., to be in the handwriting of the person whose writing is in dispute, and the comparison must be made in open Court.³⁵ In addition to the mode of proving by expert testimony, a writing to be forged or genuine, there are other modes by which the genuineness or otherwise of a writing may be established. A document may be proved genuine or otherwise by the evidence of persons proved to be acquainted with the handwriting of the alleged writer;³⁶ or by comparing in Court the disputed writing with some other writing admitted or proved to be genuine;³⁷ but this latter mode has been disapproved by experienced Judges,³⁸ as a hazardous and inconclusive mode of proof,³⁹ and the practice of the Court itself acting as an expert and pronouncing a document to be a forgery has been deprecated,⁴⁰ particularly when there is no evidence or allegation of forgery.⁴¹ Evidence relating to the dissimilarity of signatures, when the dissimilarity is not that of a general character but merely of particular letters, is peculiarly fallacious,⁴² and the Court is not a competent judge of this matter. On the other hand, if two signatures, when one is superimposed on the

34. Mobarik Ali Ahmed v. State of Bombay, 1957 Cr. L.J. 1346.
35. Khijiruddin v. E., 53 C. 372: 92 I.C. 442: 1926 C. 139: 27 Cr. L.J. 266; Suresh Chandra Sanyal v. E., 39 C. 606: 14 I.C. 753: 13 Cr. L.J. 239; In re Basrur Venkata Row, 36 M. 159: 14 I.C. 418: 13 Cr. L.J. 226; Barindra Kumar Ghose v. E., 37 C. 467: 7 I.C. 359: 11 Cr. L.J. 453; but see In re Sithava Naik, 30 I.C. 751: 16 Cr. L.J. 703, where it was held that it is not necessary that the comparison should be made in Court and that it is sufficient if the documents are shown to the expert in court.
36. Section 47; Ganpatrao Khanderao Vijaykar v. Vasantrao Ganpatrao Vijaykar, 141 I.C. 747: 1932 B. 588; Khijiruddin v. E., 53 C. 372: 92 I.C. 442: 1926 C. 139: 27 Cr. L.J. 266; Jasoda Kuer v. Janak Missir, 4 P. 394: 92 I.C. 1034: 1925 P. 787; In the matter of Chanda Singh, 18 P.R. 1915 Cr.: 28 I.C. 722: 16 Cr. L.J. 338; Shankarrao Gangadhar v. Ramji Harjivan, 28 B. 58. The witness must show his acquaintance with the handwriting of the writer to make his evidence relevant, Jalaluddin v. E., 15 I.C. 979: 13 Cr. L.J. 563; In re Basrur Venkata Row, 36 M. 159: 14 I.C. 418: 13 Cr. L.J. 226.
37. Section 73; Ganpatrao Khanderao Vijaykar v. Vasantrao Ganpatrao Vijaykar, 141 I.C. 747: 1932 B. 588; Khijiruddin v. E., 53 C. 372: 92 I.C. 442: 1926 C. 139: 27 Cr. L.J. 266; Barindra Kumar Ghose v. E., 37 C. 467: 7 I.C. 359: 11 Cr. L.J. 453; Vembu Amal v. Esakkia Pillai, 1949 M. 419: 1949, 1 M.L.J. 71: 1949 M.W.N. 47; see Balak Ram v. Muhammad Said, 77 I.C. 872: 1923 L. 695.
38. Galstaun v. Sonatan Pal, 78 I.C. 668: 1925 C. 485; Batahu Jha v. Parmeshwar Rai, 64 I.C. 234; Suresh Chandra Sanyal v. E., 39 C. 606: 14 I.C. 753: 13 Cr. L.J. 289.
39. Rudragonda Venkangonda v. Basangonda Danappagonda, 1939 B. 1257; Major Stanley Hugh Barker v. Mrs. Patricia May Barker, 1955 M.B. 103 (F.B.); Latafat Husain v. Onkar Mal, 152 I.C. 1042: 1935 O. 41; Ambika Charan Barua v. Nareswari Dasi, 85 I.C. 525: 1925 C. 145; Balak Ram v. Muhammad Said, 77 I.C. 872: 1923 L. 695; Sarojini Dasi v. Haridas Ghosh, 49 C. 235: 66 I.C. 774: 1922 C. 12; Barindra Kumar Ghose v. E., 37 C. 467: 7 I.C. 359: 11 Cr. L.J. 453.
40. Bibi Kaniz Zainab v. Mobarak Hossain, 72 I.C. 748: 1924 P. 284; Barindra Kumar Ghose v. E., 37 C. 467: 7 I.C. 359: 11 Cr. L.J. 453.
41. Galstaun v. Sonatan Pal, 78 I.C. 668: 1925 C. 485.
42. Galstaun v. Sonatan Pal, 78 I.C. 668: 1925 C. 485; but see Sarojini Dasi v. Haridas Ghosh, 49 C. 235: 66 I.C. 774: 1922 C. 12.

other, perfectly coincide, it is almost a certain indication of the fact that one is a forgery traced from the other.⁴³ The admitted abnormality of a signature is at least some evidence that it is not the handwriting of the person who purports to have written it. Where the character of the signature is such that the Court is satisfied that the signature is not that of the alleged testator, there is nothing to prevent the Court from acting upon its conviction and pronouncing against the document as a valid testamentary disposition; though, where witnesses have positively affirmed that the testator did, in fact, execute the will in their presence, the Court will be slow to hold the document to be a forgery unless evidence is to be found *aliunde* which tends to confirm the conclusion at which the Court has arrived independently and from a consideration of the nature of the signature by which the testator is alleged to have executed the will.⁴⁴ See notes to section 67, where different modes of proving handwriting are fully discussed.

Report of a handwriting expert.—The mere report of an expert who has not been examined in Court, which is not supported even by an affidavit, is no evidence and is entirely inadmissible.⁴⁵ But where a party has himself called for the report of an expert, the report will be admissible against him, even if he has not examined the expert as a witness in proof of the report.⁴⁶

Examination of handwriting expert is a sine qua non.—A Court is competent to compare the disputed writing of a person with others which are admitted or proved to be his writings. It may not be safe for a Court to record a finding about a person's writing in a certain document merely on the basis of comparison but a Court can itself compare the writings in order to appreciate properly the other evidence produced before it in that regard. The opinion of a handwriting expert is also relevant in view of Section 45 of the Evidence Act, but that too is not conclusive. It has also been held that the sole evidence of a handwriting expert is not normally sufficient for recording a definite finding about the writing being of a certain person or not. It follows that it is not essential that the handwriting expert must be examined in a case to prove or disprove disputed writing.⁴⁷

Value of expert testimony on questions of handwriting.—It may be that normally it is not safe to treat expert's evidence as to handwriting as sufficient basis for conviction. It may be relied upon in conjunction with other internal and external evidence relating to the document in

43. Woodroffe, Ev., 9th Ed., 450 citing Rogers, Expert Testimony, 290, 292; Hagan, Disputed Handwriting, 91, 92.

44. Lila Sinha v. Bijoy Pratap Deo Singh, 87 I.C. 534: 1925 C. 768; see Sarojini Das v. Haridas Ghosh, 49 C. 235: 68 I.C. 774: 1922 C. 12.

45. Tasaduq Hussain v. Basawan Rai, 141 I.C. 767: 1933 P. 159; Ram Autar Shukul v. Baldeo Shukul, 11 P. 782: 140 I.C. 895: 1932 P. 352; Fitain v Baboo Singh, 79 I.C. 641: 1924 N. 183; Raghunath

Mody v. The Kurseong Municipality, 76 I.C. 394: 1923 C. 561: 25 Cr. L.J. 170; Peary Lal v. E., 75 I.C. 148: 1923 A. 601: 24 Cr. L.J. 900; Padma Priya Debya v. Dharma Das Deb Sarma, 10 I.C. 965: 15 C.W.N. 728; see Kazim Husain v. Shambhoo Nath, 132 I. C. 259: 1931 O. 298.

46. Dil Mohammad v. Sain Das, 100 I.C. 922: 1927 L. 396.

47. The State of Gujarat v. Vinaya Chandra Chhota Lal, 1967 S. O.J. (1) 821 (1).

dispute.⁴⁸ Expert opinion must always be received with great caution,⁴⁹ especially the opinion of handwriting experts. An expert witness, however impartial he may wish to be, is likely to be unconsciously prejudiced in favour of the side which calls him. The mere fact of opposition on the part of the other side is apt to create a spirit of partisanship and rivalry, so that an expert witness is unconsciously impelled to support the view taken by his own side. Besides it must be remembered that an expert is often called by one side simply and solely because it has been ascertained that he holds views favourable to its interests.⁵⁰ Of all kinds of evidence admitted in a Court, this is the most unsatisfactory. It is so weak and decrepit as scarcely to deserve a place in our system of jurisprudence.¹ In view of this infirmity of expert testimony, it is the settled practice of Courts not to base a finding merely on expert opinion.² Conclusions based on mere comparison of handwriting must, at best, be indecisive, and yield to the positive evidence in the case.³ The opinion of an expert cannot be more reliable than the statement of a witness of fact such as a petition-writer who had seen the party signing the document.⁴ In the face of the overwhelming documentary evidence proving execution of a document, the opinion of a handwriting expert to the contrary is of no value.⁵ Experts, like lawyers, differ in their opinion, and it is in the highest degree unsafe to rely on expert evidence when the admitted facts lead to a contrary conclusion.⁶ It is extremely unsafe to base a conviction upon the opinion of handwriting experts without substantial corroboration.⁷ A comparison of handwriting is something hazardous and inconclusive, and should be made with care and caution in the light of assistance that may be available in the shape of expert evidence or arguments on behalf of the parties concerned or other ways ensuring a right decision. No hard and fast rule can possibly be laid down as to the best method of arriving at a proper conclusion on the question of similarity of handwriting. But the most important things to examine are the general characteristics, formation of letters, fixed pen habits and mannerisms. The identity or resemblance in handwriting has to be found out on the value of the effect of various considerations arising from individual characteristics and idiosyncracies which have been embodied in the technical

48 Ram Chandra v. State of U P., 1957 Cr. L.J. 559.

49. Kazim Husain v. Shambhoo Nath, 132 I.C. 259; 1931 O. 298; Deputy Commissioner, Lucknow v. Chandra Kishore Tewari. 1947 O. 180 (F.B.).

50. Sadiqa Begum v. Ata Ullah. 144 I.C. 497; 1933 L. 885; Diwan Singh v. E., 144 I.C. 331; 1933 L. 561; 34 Cr. L.J. 735; Hari Singh v. Lachmi Devi, 59 I.C. 220; 1921 L. 126.

1. Indar Datt v. E., 132 I.C. 185; 1931 L. 408; 32 Cr. L.J. 818; Lawson, Expert and Opinion Evidence, 3rd Ed., 327; see Batahu Jha v. Parmeshwar Rai. 64 I.C. 234.

2. Saqlain Ahmad v. E., 1938 A. 165; 160 I.C. 264; 37 Cr. L.J. 263; In re Basur Venkata Row, 38 M 159; 14 I.C. 418; 13 Cr. L.J.

226; Punjab National Bank, Ltd. v. Mercantile Bank of India, Ltd. 8 I.C. 98; Lalta Prasad v. E., 5 I.C. 355; 11 Cr. L.J. 114; Kali Charan Mukerji v. E., 2 I.C. 154; 9 Cr. L.J. 498, 2 A L.J. 444; Deputy Commissioner, Lucknow v. Chandra Kishore Tewari, 1947 O. 180 (F.B.).

3. Kishore Chandra Singh Deo v. Ganesh Prasad Bhagat, 1954 S.C. 316.

4. Lal Singh Didar Singh v. Guru Granth Sahib, 1951 Pepsu 101; see also Govardhan Das v. Ahmadi Begam, 1953 Hyd 181.

5. Ranbasi Store v. President of the Union of India, 1953 A. 318.

6. See Sheotahal Singh v. Arjun Das, 56 I.C. 879.

7. Sudhindra Nath Dutt v. The King, 1952 C. 422.

language of experts.⁸ Mere resemblance between two writings is not sufficient to create the conviction that they were written by one and the same person,⁹ since it is not difficult to forge the handwriting of a person in such a manner as to make it impossible for even the most acute and experienced Judge to discriminate between the false and the true.¹⁰ There may, however, be cases where the handwriting is of such a peculiar character that the conclusion as to the identity of the writer is almost irresistible.¹¹ On the other hand, a clear dissimilarity of habit between two writings is evidence to show that the documents are not in the handwriting of the same person.¹² The evidence of a handwriting expert need not definitely point out that anybody wrote a particular thing. The expert is only to point out the similarities to the Court, which has to determine whether a particular writing is to be assigned to a particular person.¹³ A court should not surrender its own opinion to that of experts who are called before it, but with such help as the experts can afford the Court must form its own opinion on the subject in hand.¹⁴ Where the trial is by jury the question of the reliability of the evidence of an expert in handwriting is clearly one for the jury to decide.¹⁵ The evidence of an expert in handwriting is of little value when it is contradicted by that of another.¹⁶ Where the signature examined by an expert is in a language which he cannot read or write, his opinion is not of much value, and can be used merely as corroborative of other evidence.¹⁷ Experts can also give their opinion as to whether a writing is in a feigned or natural hand,¹⁸ as to the probable age of a document, and as to whether inter-lineations were written contemporaneously with the rest of a document.¹⁹ Whatever the value of expert testimony in general may be, if a party wishes to produce an expert in evidence the Court is bound to call him.²⁰ On the other hand, since the evidence of a handwriting expert is not of much value, no inference adverse to a party should be drawn from the

- 8 Jitendra Nath Gupta v. E., 1937 C. 99: 169 I.C. 977: 38 Cr. L.J. 818 (S.B.); see also Shrinivas Pannalal Chockhani v. The Crown, 1951 N. 226: I.L.R. 1951 N. 104.
9. Sarojini Dasi v. Haridas Ghosh, 49 C. 235: 66 I.C. 774: 1922 C. 12; Batahu Jha v. Parmeswar Rai, 64 I.C. 234; Lalita Prasad v. E., 5 I.C. 355: 11 Cr. L.J. 114; Ambal Bagvam v. Ramayya Padayachi, 1955 M. 88.
10. Sarojini Dasi v. Haridas Ghosh, 49 C. 235: 66 I.C. 774: 1922 C. 12
11. In re Basrur Venkata Row, 36 M. 159: 14 I.C. 418: 13 Cr. L.J. 226; Kali Charan Mukerji v. E., 2 I.C. 154: 9 Cr. L.J. 498; see also Lalita Prasad v. E., 5 I.C. 355: 11 Cr. L.J. 114.
- 12 Lila Sinha v. Bijoy Pratan Deo Singh, 87 I.C. 534: 1925 C. 768; In re Basrur Venkata Row 36 M. 159: 14 I.C. 418: 13 Cr. L.J. 226; Sarojini Dasi v. Haridas Ghosh, 49 C. 235: 66 I.C. 774: 1922 C. 12
13. Wakeford v. Lincoln Bishop, 1921 P.C. 168.
- 14 In the matter of U., an advocate,

- 13 R. 518: 1935 R. 178: 156 I.C. 582: 36 Cr. L.J. 961 (S.B.); Moosa Ghulam Ariff v. Khoo Soo See, 157 I.C. 82; Jitendra Nath Gupta v. E., 1937 C. 99: 169 I.C. 977: 38 Cr. L.J. 818; Prasad Mahto v. Mst Josada Kuer, 18 P. L.T. 491: 4 B.R. 628; Durga Prasad v. State, 1952 N. 289: 1952 Cr. L.J. 1225.
- 15 Kishori Kishore Mishra v. E., 1935 C. 208: 156 I.C. 396: 36 Cr. L.J. 921.
16. Mohammad Ziaulla Khan v. Rafiq Mohammad Khan, 1939 O. 213; Sadiqa Begum v. Ata Ullah, 144 I.C. 497: 1933 L. 885.
- 17 Ram Sewak Sahu v. E., 1933 P. 559; see also Saqlain Ahmad v. F., 1936 A. 165: 160 I.C. 264: 37 Cr. L.J. 263.
18. 6 Cox 163.
19. Re Hindmarch, L.R. 1 P. & D. 307.
- 20 Ram Narain Sharma v. E., 139 I. C. 508: 1932 L. 481: 33 Cr. L.J. 761; see, however, Sheotahal Singh v. Arjun Das, 56 I.C. 879,

mere fact that the party did not call an expert to prove the genuineness of a signature.²¹ There is nothing in the Evidence Act to require the evidence given by an expert in any particular case to be corroborated before it could be acted upon as sufficient proof of what the expert states. Of course the question as to how much reliance a Court would be entitled to place on the statement of any particular witness in any particular case must necessarily depend on the facts and circumstances of that particular case.²² The opinion of a handwriting expert should not be rejected because it is based solely on the photograph.²³

Opinion as to typewritten matters.—Value of expert opinion as to typing. The expert opinion was that the letter was not typed on the typewriter then in use. It was typed on another typewriter. Such evidence is inadmissible, not being covered by Section 45 of the Act.²⁴ A proven specimen of typewriting may be admitted in evidence for the purpose of comparison with a disputed specimen, on the principle that where an impression is made on paper, wood, leather, or any other plastic material by an instrument or mechanical contrivance having or possessing a defect or peculiarity, the identity of the instrument may be established by proving the identity of the defects or peculiarities which it impresses on different papers.²⁵ The opinion of a witness that one document has been typewritten on the same machine as another document is not admissible under section 45. The Court may ask the witness to explain points in favour of the view whether the two documents have or have not been typewritten on the same machine, but the Court cannot treat the witness's opinion as expert testimony.²⁶

Finger Impression Experts

Thumb-impression experts.—The knowledge of finger prints is a science and the evidence of persons conversant with this science is admitted on principles similar to those governing the admissibility of the evidence of experts in handwriting. Before the amendment of this section by Act V of 1899, evidence of persons skilled in questions relating to the identity of thumb-impressions was not admitted under this section; but the similarity or dissimilarity of thumb-impressions could be considered as evidence of identity or otherwise under sections 9 and 11 of the Act, provided the comparison was made, and opinion on this comparison formed, by the Court itself and not by an expert.²⁷ The study of finger prints is now generally admitted to constitute a science,²⁸ since it has been ascertained "that between birth and death there is absolutely no change, say, in 699 out of the 700 numerous characteristics of the markings of the

21. *Gobindjee Madhuvjee & Co. Ltd. v. Smith*, 143 I.C. 698: 1928 P. 563.

22. *Ladharam Narsinghdas v. E.*, 1945 S. 4.

23. *Shriniwas Pannalal Chockhani v. The Crown*, 1951 N. 226: I.L.R. 1951 N. 104.

24. *Hanumant Govind Nargundkar v. State of Madhya Pradesh*, 1952 S. C.R. 1091, 1953 Cr. L.J. 129.

25. 10 R.C.L. 999.

26. *Bachcha Babu v. E.*, 155 I.C. 369: 1935 A. 162: 36 Cr. L.J. 684; *Jhabwala v. E.*, 145 I.C. 481: 1933 A. 690: 34 Cr. L.J. 967; see also *Manabendra Nath Roy v. E.*, 148 I.C. 833: 193 A. 498: 35 Cr. L.J. 768.

27. *Q.E. v. Faqir Mahomed Sheikh, etc.*, 1 C.W.N. 33.

28. *Dilead v. E.*, 113 I.C. 68: 1929 L. 210: 30 Cr. L.J. 52; *E. v. Abdul Hamid*, 32 C. 759.

fingers of the same person";²⁹ and the similarity of finger prints is looked upon as a very reliable test of identity. By those who have made a study of the subject, there has never yet been found any case in which the pattern made by one finger exactly resembled the pattern made by any other finger of the same or any other hand.³⁰ The term "finger impression" does not include palm impressions, but there can be no doubt that the opinion of an expert on the identity of a palm impression is admissible,³¹ as the comparison of palm impressions also constitutes a science.

Competency of finger print experts.—No precise rule can be laid down as to the qualifications which a person must possess to be able to depose as an expert in the examination of finger prints. There must be profession of some special qualification by study or experience on the part of a person who lays claim to the position or character of an expert. A person who has studied finger-impressions for five months in a training school and thirteen months in the office of the Inspector-General of Police and who has examined two or three lacs of impressions and himself taken thousands of impressions is a competent expert witness.³²

Value of finger print experts' testimony.—The evidence of an expert should be approached with considerable care and caution, and the attention of the jury must be drawn to the infirmity of such evidence.³³ The argument in finger print cases rests on a simple deduction from a number of observations of the similarities and differences between the finger prints in question, and there is no reason why it should not be a sure foundation for a conclusion, and it may be a better one than any based on direct evidence.³⁴ The comparison of thumb-impressions has become an exact science and the evidence of an expert on this subject is entitled to considerable weight.³⁵ The evidentiary value of identity afforded by the prints of two or three fingers which contain even a few points of resemblance in the minutiae and no points of disagreement is so great as to render it superfluous to seek confirmation from other sources.³⁶ Expert opinion as to the similarity of finger-impressions stands on an entirely different footing from expert opinion as to the similarity of handwriting. No two human beings have the same thumb marking; and if no difference whatever can be found between one mark and another, the conclusion is irresistible that the same thumb made both.³⁷ Therefore, a conviction based on a comparison of the thumb-impression of the accused person with the thumb-impression on the document in question is not open to any legal objection,³⁸ though Courts regard it unsafe to act on

29. Henry, *Finger Prints*, 4th Ed., 16—19.

30. *Ganga Sahai-Bhagmal v. Molar*, 155 I.C. 799: 1935 L. 147; Q.E. v. Faqir Mahomed Sheikh, etc., 1 C.W.N. 33.

31. *E. v. Babulal Behari*, 52 B. 223: 108 I.C. 508: 1928 B. 158: 29 Cr. L.J. 410.

32. *E. v. Abdul Hamid*, 32 C. 759.

33. *Panchu Mondal v. E.*, 1 C.L.J. 385.

34. *Public Prosecutor v. Virammal*, 46 M. 715: 69 I.C. 374: 1923 M. 178: 23 Cr. L.J. 694.

35. *Diledad v. E.*, 113 I.C. 68: 1929 L. 210: 30 Cr. L.J. 52.

36. *E. v. Sahdeo*, 3 N.L.R. 1.

37. *Ganga Sahai-Bhagmal v. Molar*, 155 I.C. 799: 1935 L. 147; *Diledad v. E.*, 113 I.C. 68: 1929 L. 210: 30 Cr. L.J. 52; *Ahmada v. E.*, 9 P.R. 1914 Cr.: 27 I.C. 203: 16 Cr. L.J. 139.

38. *Fakir Mohammad v. E.*, 60 B. 187: 1936 B. 151: 37 Cr. L.J. 539; *Harendra Nath Sen v. E.*, 133 I.C. 111: C. 441: 32 Cr. L.J. 1001; *Basgit Singh v. E.*, 6 P. 305: 104 I.C. 626: 1928 P. 129: 28 Cr. L.J. 850; *Public Prosecutor v. Kandasami Thevan*, 50 M. 462: 98 I.C. 99: 1927 M. 696: 27 Cr. L.J. 1251.

such evidence in the absence of other corroborative circumstances.³⁹ Courts should exercise great caution in arriving at a conclusion by a comparison of thumb-impressions. The positive evidence of witnesses who were undoubtedly present and eye-witnesses to the transaction should not be lightly brushed aside.⁴⁰ The Court should be very chary in accepting the opinion of a finger print expert as to the age of a thumb-mark as fixing the date of a document when such date is markedly opposed to the date which appears upon the document itself, so long as no serious extraneous testimony controverts the date which appears on the document.⁴¹ Section 73 of the Act authorizes a Court to obtain from any person present in Court a specimen of his thumb-impression for the purpose of causing it to be compared by an expert,⁴² or for the purpose of its being compared by the Court with the disputed impression.⁴³ There is nothing in the so-called science of finger prints, or the qualifications of an expert in it, which need deter a Court from applying its own magnifying glass or its own eyes and its own mind to the evidence and verifying the results submitted to it by the witnesses.⁴⁴ It would, however, be risky for the Court to form an opinion without the assistance of a finger print expert.⁴⁵ Neither a Court nor a jury is bound to accept the opinion of an expert in thumb-impressions, without the corroboration of its own intelligence as to the reasons which guided him in his conclusions.⁴⁶ It cannot be said that it is unsafe to base a conviction on the uncorroborated testimony of a finger print expert. But the Court cannot delegate its authority to the expert and has to satisfy itself as to the value of the evidence of the expert in the same way as it must satisfy itself as to the value of any other evidence.⁴⁷ The question of the identity of thumb-marks is a question of fact to be decided by evidence as any other question of fact;⁴⁸ and, therefore, in trials by jury, eminently a matter for the jury and not for the Judge.⁴⁹ In dealing with the evidence of a finger-print expert the Court must be careful not to delegate its authority to a third party. The Court must satisfy itself that the accused is guilty and cannot hold him guilty because the expert comes forward and says that in his opinion the accused must be guilty. The Court must

39. Harendra Nath Sen v. E., 133 I. C. 111: 1931 C. 441: 32 Cr. L.J. 1071; Basgit Singh v. E., 6 P. 305: 104 I.C. 626: 1928 P. 129: 28 Cr. L.J. 850; Jassu Ram v. E., 4 L. 246: 77 I.C. 423: 1923 L. 622: 25 Cr. L.J. 375; Bazari Hajam v. E., 1 P. 242: 63 I.C. 958: 1922 P. 73: 23 Cr. L.J. 638; E. v. Abdul Hamid, 32 C. 759; State v. Karu Gope, 1954 P. 131: 1954 Cr. L.J. 201.

40. Baidya Nath Dutt v. Alef Jan Ribi, 70 I.C. 194: 1923 C. 240.

41. Ramlakhan Panda v. Dharmdeo Misir, 97 I.C. 335: 1926 P. 575.

42. Public Prosecutor v. Kandasami Thevan, 50 M. 462: 98 I.C. 99: 1927 M. 696: 27 Cr. L.J. 1251; Supt. & Remembrancer of Legal Affairs v. Kiran Bala Dasi, 93 I. C. 73: 1926 C. 531: 27 Cr. L.J. 409. But the practice of taking finger prints of an accused was

strongly condemned in Bazari Hajam v. E., 1 P. 242: 68 I.C. 958: 1922 P. 73: 23 Cr. L.J. 638.

43. Public Prosecutor v. Kandasami Thevan, 50 M. 462: 98 I.C. 99: 1927 M. 696: 27 Cr. L.J. 1251.

44. Public Prosecutor v. Virammal, 46 M. 715: 69 I.C. 374: 1923 M. 178: 23 Cr. L.J. 694.

45. Bibi Zainab v. Anwar Khan, 1946 P. 104.

46. Basgit Singh v. E., 6 P. 305: 104 I.C. 626: 1928 P. 129: 28 Cr. L. J. 850; E. v. Abdul Hamid, 32 C. 759; Crown Prosecutor v. Gopal, 1941 M. 551.

47. Golam Rahman v. The King, 1950 C. 66: 83 C.L.J. 387.

48. Public Prosecutor v. Kandasami Thevan, 50 M. 462: 98 I.C. 99: 1927 M. 696: 27 Cr. L.J. 1251.

49. Panchu Mondal v. E., 1 C.L.J. 385.

satisfy itself as to the value of the evidence of the expert in the same way as it must satisfy itself of the value of other evidence. The Court has to rely on the expert upon two distinct points. First of all on the question of similarity between the marks, which is a question of fact on which the Court can, and should, with the assistance of the expert satisfy itself, and secondly on point which is one for expert opinion, whether it is possible to find the finger-prints or thumb-impressions of two individuals corresponding in as many points of resemblance as are shown to exist between the impressions found in the case before the Court and those of the accused. When the expert tells the Court that it is impossible to find so many characteristics identical in the finger prints of two persons and when that statement agrees entirely with what one has read on the subject in scientific books, the Court need not hesitate in accepting the opinion.⁵⁰ The impression with which the admitted thumb-impression is to be compared must be shown to be that of the person whose identity is sought to be established by this means.¹ Where the thumb-impressions are not clear but blurred, the expert evidence cannot be treated as reliable and conclusive.² The opinion of an expert, which is admissible against an accused, is the opinion given by him at the trial. The opinion formed by him before the trial in another case is not substantive evidence. It is doubtful if such opinion, recorded for the purposes of the previous suit, is at all admissible.³ The expert should be required to explain to the Court the reasons for his opinion.⁴

The report of a finger print expert.—In *re-Govinda Reddy*⁵ it was pointed out that the science of comparison of finger-prints has developed to a stage of exactitude, and it is quite possible for the Court to compare the impressions taken from finger-prints of individuals with disputed impressions, provided they are sufficiently clear and enlarged photographs are available. The identification of finger impressions with the aid of a magnifying glass is not difficult, particularly when the photographs of the latent and patent impressions are pasted side by side. But Courts of Law, must not play the role of finger-print expert when the point in issue is not the patent differences in pattern visible to the naked eye and which will rule out that the two impressions for comparison are by the same digit, but when by reason of detailed counting of similarities the identity or the non-identity of the two impressions for comparison have got to be established. In such cases the Court must insist upon clear evidence being led including that of an expert.⁶ The Court must apply its own mind and find out with the explanatory help of the expert and the counsel appearing on both sides whether the identity or the non-identity spoken to by the expert is based upon sound reasons.⁷ The report of a finger print expert is inadmissible, unless the expert is called as a witness and is examined.⁸

50. *E. v. Faqir Mohammad Ramzan*, 60 B. 187: 1936 B. 151: 162 I.C. 231: 37 Cr. L.J. 539.

1. *Hulost v. E*, 7 Cr. L.J. 406; *E. v. Sahdeo* 3 N.L.R. 1.

2. See *E. v. Abdul Hamid*, 32 C. 759.

3. *Ganda Mal v. E.*, 110 I.C. 810: 1928 L. 921: 29 Cr. L.J. 778

4. *Crown Prosecuotr v. Gopal*, 1941 M. 551: 195 I.C. 183: 42 Cr. L.J. 596.

5. In *Re. Govinda Reddy*, 1958 Cr. L.J. 1489.

6. *Amar Singh v. Ganga*, A.I.R. 1956 Bhopal 6.

7. In *re, Godavarthi*, 1960 Cr. L.J. 315.

8. *Bhurey Singh v. Karan Singh*, 1935 A. 142; *Wadahawa v. Jai Kishen Das*, 106 I.C. 493: 1928 L. 427; *Pitain v. Baboo Singh*, 79 I.C. 641: 1924 N. 183; *Chajju v. Ayub Ahmad*, 28 I.C. 132: 38 B. 703; *Padma Priya Debya v. Dharma Das Deb Sarma*, 10 I.C. 965.

But if a party invites the opinion of a finger print expert and the expert submits a report which is placed on the record, but the expert is not examined as a witness, the party inviting the opinion of the expert will be deemed to have accepted the expert's report as evidence and will not be permitted to object to its admissibility in appeal.⁹

Sections 45 and 5—Evidence of thumb impression expert—Importance of Duty of Court.—Evidence of a thumb impression expert has an important bearing and is bound to be of great value in determining the issue regarding the validity of a document which purports to bear thumb impression of an executant when those thumb impressions are denied. It is a matter of common knowledge that science of finger print is more exact than that relating to handwriting. In cases of comparison of finger prints, the points of similarity and difference are easily discernable and the Courts must apply their mind properly to the evidence of experts in such cases. The Judge commits a gross error of law in not even considering the evidence of such expert.¹⁰

Opinion of Expert Trackers.—Opinion of expert trackers as to the identity of the shoe-prints of the accused with the prints found at the scene of offence, is relevant and admissible, though it may not amount to much by itself. The science of identifications of foot-prints is a rudimentary science, and much reliance cannot be placed upon the evidence of trackers as to the identity of foot-prints or shoe-prints. The evidence was admissible and could be considered, along with other evidence as to the identity of the accused as the person who had committed the crime.¹¹

Evidence of foot print expert.—Evidentiary value—It is unsafe to convict accused solely on the opinion of foot-print expert—Science of identification of foot-print impression is not an exact science.¹²

Footprints.—The section does not include footprints within its ambit as it does the finger impressions. Notwithstanding, this evidence of a footprint expert is admissible in evidence.¹³ In a criminal prosecution a witness may testify as to human tracks found upon the ground at the place of the crime, and to what point they led and the size thereof as they appeared to him, and he may also testify as to the size, shape or any peculiarity of any track or tracks that he may have seen the accused make after the commission of the crime.¹⁴ The science of footprints is not exact.¹⁵ The science, if it could be so called, of footprints has not yet progressed very far. But there is no doubt whatever that evidence of similarities of the impressions of the foot, shod or unshod, given by a footprint expert, is admitted by the Courts. Such evidence comes under the head of circumstantial evidence. It is not the opinion of the expert that is of any importance, but the facts that the expert has noticed. A person who has made a study of the prints made by the human foot is better qualified to notice points of similarity or dissimilarity, than one who has

9. *Dil Muhammad v Sain Das*, 100 I.C. 922: 1927 L. 396.

10. *Hukum Singh v Smt. Udham Kaur*, (1969) 71 Pun. L.R. 908.

11. *Pritam Singh v. Punjab*, 1956 Cr. L.J. 805 (S.C.).

12. *Bhulakiram Koiri v. State*, 73

Cal. W.N. 947, 1970 Cr. L.J. 403 (Cal.).

13. *Ganesh Gogoi v. State*, 1955 Assam 51.

14. 10 R.C.L. 993.

15. *Chandrama Prasad Chamar v. State*, I.L.R. 1951, I.C. 539.

made no such study. He is able to lay these points before the Court, and from his evidence the Court draws its own conclusions.¹⁶ The Court is entitled to take into consideration the evidence of a person who has seen a footprint and taken the footprints of the accused and found that they are very similar. Such evidence is not, however, sufficient to bring home the offence to the accused in the absence of further knowledge regarding the differences between one foot and another.¹⁷ The mere fact that foot marks are found which tally with those of accused's shoes is not sufficient. There may be a large number of shoes of the size of the accused's shoes. The evidence must go further and show that the marks had some peculiarity which was found in the shoes of the accused, and would not be found in most other shoes.¹⁸ Evidence that there were footprints at or near a scene of offence or that these footprints came from a particular place or led to a particular place is relevant evidence under section 7, and statements as to these facts made by persons skilled in identifying footprints is admissible under section 45, Evidence Act. Whether a particular tracker called upon to assist is or is not an expert in this art or science, is a matter to be decided by the Court before reliance can be placed upon his evidence. But if it is established to the satisfaction of the Court that the tracker is a person capable of distinguishing and identifying footprints, his evidence should be given such consideration as it may deserve.¹⁹ Before relying on the opinion of the expert in footprints as conclusive evidence against the accused, the Judge should form his own opinion with regard to the identity of the footprints found at the place of the commission of the offence with the footprints of the accused.²⁰ Evidence that a tracker identified certain footsteps is admissible, notwithstanding the provisions of section 162, Cr. P. Code.²¹

Identification of Hair.—The science of identification of hair has not attained the certainty of a scientific study.²²

Dog tracking Evidence—Admissibility.—The tracker dog's evidence cannot be likened to the type of evidence accepted from scientific experts describing chemical reactions, blood tests and the actions of bacilli, because the behaviour of chemicals, blood corpuscles and bacilli contains no element of conscious volition or deliberate choice. Dogs are intelligent animals with many thought processes similar to the thought processes of human beings and wherever there are thought processes there is always the risk of error, deception and even self-deception. In the present state of scientific knowledge evidence of dog tracking even if admissible is not ordinarily of much weight. Am. Juris 2nd Edn., Vol. 29, p. 429, para 378 and 1866 N.I. 1960, Ref. to.²³

Evidence of dog tracking—Not ordinarily of much weight.—The dogs are intelligent animal with many thought processes similar to the

16. Mylaswami Goundan v E., 1937 M. 951.

17. In re Oomayan, 1942 M. 452 (2).

18. Bhikha Gober v. E., 1943 B. 458: 210 I.C. 362.

19. Sadik v. E., 1942 S. 11: 198 I.C. 110: 43 Cr. L.J. 308.

20. In re Balija Pullayya, 1941 M. 88: 192 I.C. 704: 42 Cr. L.J. 316; Fakirchand v. State, 1955 M B.

119 (F.B.).

21. Mor Mahomud v. E., 1940 C. 168: 190 I.C. 499: 41 Cr. L.J. 924.

22. Ganesh v. State of M.P., 1959 M.P.L.J. 23.

23. Abdul Razak Murtaza v. State of Maharashtra, (1969) 2 S.C.C. 234: (1969) 2 S.C.J. 870: 1970 Cr. L.J. 373.

thought processes of human beings and wherever there is thought process there is always the risk of error, deception and even self deception. In the present state of scientific knowledge evidence of dog tracking, even if admissible, is not ordinarily of much weight.²⁴

Fire arms experts.—Opinion of a ballistic expert can conclusively prove that a particular cartridge has been fired by a particular pistol.²⁵

Scope of—Murder caused by use of firearm prosecution, if bound to call ballistic expert in addition to direct evidence.—It is settled law that it is not necessary in every case where an accused person is charged with murder caused by a lethal weapon that the prosecution case can succeed only if an expert is called and examined. It cannot be laid down as an invariable proposition of law that in every case where a firearm is alleged to have been used by an accused person, the prosecution must in addition to the direct evidence, lead the evidence of a ballistic expert.²⁶

Value of the opinion of nautical assessors.—The decision of the case, however, rests entirely with the Court and even in purely nautical matters the Court is not bound to follow the advice of assessors, but on questions of nautical science and skill, great attention must obviously be paid to the opinion of the assessors since they are the only source of information on these points and some reasons should be given for disregarding them. The assessors in an appeal court are not substituted for those previously consulted; they are additional to them; and if one adviser or two advisers are to be preferred, it is because in the judgment of the court the advice given is such as, in itself, is the more acceptable. There can be no question of any appeal from one set of assessors to another.²⁷

Expert opinion of nautical advisers on nautical science and skill must be accepted, and if it is to be rejected, reasons will have to be given. The decision of the case, however, rests entirely with the Court; and even in purely nautical matters, the Court is not bound to accept their advice.²⁸

Public Analyst's certificate.—Though the certificate of a person who is declared to be a public analyst can alone be held admissible, there is nothing in the Act to prevent a qualified person from examining the sample and being actually examined in the case and speak to the contents of a certificate issued by him and which can be treated as a contemporaneous document for the purpose of refreshing memory, etc.²⁹ That the weight as a piece of evidence to be attached to the written report of a public analyst will depend upon the data of the quantitative analysis furnished by the public analyst in his report, and that the mere ipse dixit of the public analyst which cannot be adequately tested must be rejected, has been laid down in *Dindayal vs. The State*.³⁰ This was followed in *State*

24. *Abdul Razak Murtaza Dafardar v. Maharashtra*, 1969 (2) S.C.J. 870.

25. *Kalua v. State of U.P.*, 1958 Cr. L.J. 30 (S.C.).

26. *State v. Jawan Singh*, 1971 Cr. L.J. 1656 (Raj.).

27. *Asiatic Steam Navigation Co., Ltd. v. Sub. Lt. Arabinda Chakra-*

warti, 1959 S.C.A. 581: 1959 S.C.J. 815.

28. *Asiatic Steam Navigation Co. v. Arabinda Chakravarthi*, A.I.R., 1959 S.C. 597.

29. *State v. Karson Zaveri*, 1960 Cr L.J. 1582.

30. 1956 Cr. L.J. 1031.

vs. Sahatiram,³¹ wherein it was held that the certificate of the public analyst should contain the factual data which the analysis should reveal, and not merely the opinion of the public analyst as to what the data indicates about the nature of the article of food. Otherwise, if the certificate merely gives the final opinion of the public analyst and if such an opinion be held to be conclusive evidence about the nature of the article of food, the merit of the case against the accused will be really decided by the public analyst and not by the Court.³² The Punjab High Court has condemned the practice of the analyst, in cases where food is analysed, of merely stating that it is highly adulterated with extraneous vegetable matter. On the other hand, the analyst should indicate what is the extent of the impurity and what the impurity is.³³ The procedure prescribed by the relevant Acts should be strictly adhered to.³⁴

Section 45 Scope—Opinion of Architects—Regarding cost of construction—Value of.—The Architects may be experts for the purpose of designing and building houses, but they are not experts for the purpose of giving an opinion as to what would be the cost of construction in a particular year without any data about the prices of materials and wages prevalent in that particular year.³⁵

Opinion of Registrar of Trade Mark as an Expert.—Registration of trade mark—Similarity with the existing trade mark—Registrar's opinion that there was no deceptive similarity between two marks. Having an expert knowledge in the matter his opinion should not be lightly disturbed. Where, however, there is concurrent finding of two Courts below that there was deceptive similarity, the finding is binding in appeal under Art. 136 of the Constitution.³⁶

Section 45—Copyright.—In case of infringements of copyright, the Court should be reluctant to sit as experts and to decide without the aid of expert evidence.³⁷

EXPERT TESTIMONY IN GENERAL

Failure to examine Excise Inspector.—The report of an excise inspector as to the strength of illicit liquor, unless admissible under section 32 or some other section of the Act, cannot take the place of the sworn statement of the maker thereof. The excise inspector should be examined and cross-examined in Court. Then and then alone his evidence can have any weight.³⁸

Section 45—Examination of a handwriting expert if a sine qua non.—A court is competent to compare the disputed writing of a person with others which are admitted or proved to be his writings. It may not be safe for a Court to record a finding about a person's writing in a cer-

31. 1958 Cr. L.J. 8.

32. Municipal Council, Kanpur v. Badloo, 1960 Cr. L.J. 1056.

33. State v. Shanti Prakash, 1957 Cr. L.J. 390.

34. P.P. v. Kuppam, 1960 Cr. L.J. 46.

35. Diwanchand v. Tirath Ram, A.I. R. 1972 Delhi 41.

36. K.R. Chinna Krishna Chettiar v. Sri Ambal and Co., (1970) 1 S.C. J. 23.

37. Sitanath v. Mohini, 81 I.C. 754.

38. Raja Ram v. State, 1954 A 214.

tain document merely on the basis of comparison but a Court can itself compare the writings in order to appreciate properly the other evidence produced before it in that regard. The opinion of a handwriting expert is also relevant in view of section 45 of the Evidence Act, but that too is not conclusive. It has also been held that the sole evidence of a handwriting expert is not normally sufficient for recording a definite finding about the writing being of a certain person or not. It follows that it is not essential that the handwriting expert must be examined in a case to prove or disprove disputed writing.³⁹

Opinion of expert not called as a witness.—The report of an expert is not admissible unless he had been examined as a witness and the party affected by it has had an opportunity of cross-examining him.⁴⁰

In *State vs. Bhausa Hanmantsa*, it was said that, normally, in order that a certificate could be received in evidence, the person, who has issued the certificate, must be called and examined as a witness before the Court. For a certificate is nothing more than a mere opinion of the person purporting to issue the certificate, and opinion is not evidence, until the person who has given a particular opinion is brought before the Court and is subjected to the test of cross-examination. Therefore, the certificate of a medical man, without more, nor being evidence, cannot be relied upon and form the basis of a finding.⁴¹

Failure to cross-examine an expert.—Mere failure to cross-examine an expert as to the grounds of his opinion and as to the test applied would not detract from the weight of his evidence by applying to it considerations to which his attention was not directed.⁴²

Court acting as an expert.—The opinion of the Court, itself untrained in medicine and without trained assistance, on questions of medicine is valueless.⁴³ On questions of handwriting also, the practice of the Court itself acting as an expert has been disapproved.⁴⁴ But there is nothing in the so-called science of finger prints which need deter a Court from applying its own magnifying glass or its own eyes and mind to the evidences and verifying the results submitted to it by the witnesses.⁴⁵ In trials with the aid of jury, a question of handwriting or thumb-impression is entirely a matter for the jury.⁴⁶

39. *Gujarat v. Vinaya Chandra Chhota*, 1967 S.C.J. 821.

40. *Parwat Vedu Patil v. Sukdev Shivram Patil*, 1956 Bom 617.

41. I.L.R. 1962 Bom. 472: 64 Bom. L.R. 303.

42. *Sarwar Khan v. E.*, 55 I.C. 273: 21 Cr. L.J. 257.

43. *E. v. Purna Chandra Ghose*, 83 I.C. 631: 1924 C. 611: 29 Cr. L. J. 71.

44. *Azmat Ullah Khan v. M. Shiam Lal*, 1947 A. 411: 1947 A.L.J. 110; *Darshan Singh v. Prabhu Singh*, 1946 A. 67; *Ambika Charan Barua v. Nareswari Dasi*, 85 I.C. 525: 1925 C. 145; *Gulstaun v. Sonatan Pal*, 78 I.C. 668: 1926 C. 485; *Bibi Kaniz Zainab v. Mobarak Hossain*, 72 I.C. 748: 1924 P. 284; *Sarojini Dasi v. Haridas Ghosh*,

49 C. 235: 66 I.C. 774: 1922 C. 12; but see *Lila Sinha v. Bijoy Protap Deo Singh*, 87 I.C. 534: 1925 C. 768; *Makhan Lal Sircar v. Gokul Chandra Chakravarti*, 62 I.C. 832; *Kali Charan Mukerji v. E.*, 2 I.C. 154: 9 Cr. L.J. 498.

45. *Public Prosecutor v. Virammal*, 46 M. 715: 69 I.C. 374: 1923 M. 178: 23 Cr. L.J. 694; *E. v. Abdul Hamid*, 32 C. 769; see also *Public Prosecutor v. Kandasami Thevan*, 50 M. 462: 98 I.C. 99: 1927 M. 696: 27 Cr. L.J. 1251; *Panchu Mondal v. E.*, 1 C.L.J. 385; *Crown Prosecutor v. Gopal*, 1941 M. 551: 195 I.C. 183: 42 Cr. L.J. 696.

46. *Panchu Mondal v. E.*, 1 C.L.J. 385.

Value of expert testimony in general.—Perhaps the testimony which least deserves credit is that of skilled witnesses. These gentlemen are usually required to speak not to facts but to opinions, and, when this is the case, it is quite often surprising to see with what facility and to what an extent their views can be made to correspond with the wishes and interests of the parties who call them. They do not indeed willfully misrepresent what they think, but their judgment becomes so warped by regarding the subject from only one point of view that, even when conscientiously disposed, they are incapable of expressing a candid opinion. To adopt the language of Lord Campbell, “they come with such a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to their evidence”.⁴⁷ In considering the value of the evidence of an expert it must be borne in mind that an expert witness, however impartial he may wish to be, is likely to be unconsciously prejudiced in favour of the side which calls him. It must also be remembered that an expert is often called by one side simply and solely because it has been ascertained that he holds views favourable to its interests.⁴⁸ Expert evidence has little value when one expert is contradicted by another⁴⁹ or when the admitted facts of the case are against such evidence.⁵⁰ The opinion of an expert by itself may be relevant but would carry little weight with a Court unless it is supported by a clear statement of what he noticed and on what he based his opinion. The expert should, if he expects his opinion to be accepted, put before the Court all the materials which induced him to come to his conclusion, so that the Court, although not expert, may form its own judgment on those materials. The mere mention that certain kinds of tests were applied and certain results obtained, might be relevant as a piece of evidence, but would not be conclusive.¹ At the same time, if a person with special professional qualifications, such as a doctor or an engineer, is called in to make professional examination of a person or a building, and is then asked to give the result of his examination as evidence in Court, it is hardly fair to treat him as being on the same footing as those persons who may be said to make a profession of giving evidence; nor is it necessary to suppose that he must necessarily be suffering from undue bias merely because he has professional qualifications.² But there cannot be any more unsatisfactory evidence than that of an interested party called as an expert.³

It is not the duty or even the function of a Magistrate to decide beforehand whether the evidence of an expert, if produced, would influence his opinion one way or the other. That is a matter which should be settled only after the evidence has been recorded and read in the case.⁴

47. Taylor, § 58: Tracy Peerage Case, (1843) 59 R.R. 59; see Hari Singh v. Lachmi Devi, 59 I.C. 220: 1921 L. 126.

48. Diwan Singh v. E., 144 I.C. 331: 1933 L. 561: 34 Cr. L.J. 735; Hari Singh v. Lachmi Devi, 59 I.C. 220: 1921 L. 126.

49. Sadiqa Begum v. Ata Ullah, 144 I.C. 497: 1933 L. 885.

50. See Sheotahal Singh v. Arjun Das, 56 I.C. 879.

1. Ram Karan Singh v. E., 154

I.C. 341: 1935 N. 13: 36 Cr. L.J. 511; Titli v. Jones, 56 A. 428: 153 I.C. 733: 1934 A. 273; Crown Prosecutor v. Gopal, 1941 M. 551: 195 I.C. 183: 42 Cr. L.J. 606.

2. Elizabeth Mand Baines v. Ram Sahai, 1940 L. 505: 42 P.L.R. 616.

3. Judah v. Isolyne Shrojbashini Bose, 945 P.C. 174.

4. Ram Narain Sharma v. E., 139 I.C. 508: 1932 L. 431: 33 Cr. L.J. 761.

Section 45—opinion of handwriting expert—Evidentiary value.—It is well-settled that though the opinion of a handwriting expert is relevant on the question of handwriting of a person, it is not conclusive unless corroborated by clear and direct or circumstantial evidence.⁵

Evidence of a handwriting expert—Evidentiary value and binding nature.—It is well-settled law that the evidence of handwriting experts under section 45 of the Evidence Act is not conclusive and cannot be used as substantive evidence. The Court must always look for corroboration from the other evidence adduced in the case. The Court will have to take into account the various factors that surround the transaction which is in dispute and should judge the case on the basis of both external and internal evidence available in the case; the evidence of the expert *per se* is not binding on Court.^{5a}

Value of expert evidence.—The evidence of experts is nearly always a weak type of evidence.⁶

Experts are not expected to be decisive in their opinion.⁷ Their evidence can never be conclusive, as it is opinion evidence.⁸ Where a person claims to be an expert but there is no evidence about the nature of training received by him and his qualifications, and there is no data from which he arrived at his conclusion, the evidence given by him is neither legal nor sufficient.⁹

The expert's opinion does not take away the common man's judgment. They have the right to think and judge things from day-to-day experience.¹⁰ Expert evidence is nearly always a weak type of evidence, especially in the case of one who has not sufficient knowledge on the subject.¹¹

Expert's evidence not supported by reasons valueless.—A court may refuse to rely on the evidence of an expert if it is not supported by any reasons.¹²

It is not necessary for an expert to give reasons at great length. It is sufficient if he gives them briefly.¹³ But the Court may not place any reliance on an expert, who is unsupported by reasons.¹⁴

Finding based on expert testimony may be challenged in second appeal.—It has been ruled in some decisions that where a finding is based on the opinion of experts, it is not necessarily a finding on facts proved or directly demonstrated and may, therefore, be interfered with in second

5. Sridhar Jena v. The State (1970) 36 Cut. L.T. 1251.

5a. Shardabai v. Sayed Abdul Hai (1972) 2 Mys. L.J. 407.

6. Melappa v. Guramma, A.I.R. 1956 Bom. 129.

7. Ishwari Prasad v. Mohammad Isa (1963) 3 S.C.R. 722.

8. See Ayub v. State A.I.R. 1967 Goa 17.

9. State v. Madhukar Gopinath 1965 B. 257; 67 Bom. L.R. 226,

10. Bir Bahadur v. State, A.I.R. 1956 Assam 15, 16.

11. Nellappa v. Guramma, A.I.R. 1956 Bom. 129.

12. Haji Mohammed Ekramul Haq v. State of West Bengal, 1959 S.C.J. 443; 1959 S.C.A. 477.

13. Prem Shanker v. State 1957 Cr. L.J. 108 (All.).

14. Haji Mohammad Ekramul Haq v. State of West Bengal 1959 S.C.J. 443,

appeal.¹⁵ It is, however, submitted that where an expert gives his opinion as to the existence or non-existence of a "fact" as defined by section 3, the opinion is admissible evidence of the existence or non-existence of that fact and it is no more open to a Court of second appeal to go behind a finding based on such evidence than to go behind a finding based on the evidence of an ordinary witness.

Evidentiary value of photographs.—The uses for which, upon mere production of them, photographs can be accepted as means of proof of matters of fact require careful delimitation. A photographic picture cannot be relied upon as proof in itself of the dimensions of the depicted object or objects, and cannot be made properly available to establish the relative proportions of such objects except by evidence of personal knowledge or scientific experience to demonstrate accurately the facts sought to be established. The extent to which and the processes by which an accurate topographic plan can be produced from a pictorial delineation of a scene are not matters of common knowledge but are matters for experts. Two prerequisites for the conversion of a photographed picture of a landscape into a map or plan—after ascertainment of the viewpoint of the photographer—are said to be proof that the lens used had been accurately corrected to yield what is known as a flat field and knowledge of the angle to the horizontal plane at which the camera was held.¹⁶

Whether expert testimony of handwriting can be based on photographs—Admissibility of photographs.—Even if the original photographs be not forthcoming, opinions as to handwriting can be formed from the photographs. It is common knowledge that experts themselves base their opinion on enlarged photographs. The photos were facsimiles of the writings and could be compared with the enlargements of the admitted comparative material. If the Court is satisfied that there is no trick photography and the photograph is above suspicion, the photograph can be received in evidence. It is, of course, always admissible to prove the contents of the document, but subject to the safeguards indicated, to prove the authorship.^{16a}

Mode of impeaching the credit of an expert.—The credit of an expert may be impeached like that of any other witness under sections 146, 153 and 155. He may be asked if he had given a contrary opinion on the same matter at some other time and whether his evidence has been disbelieved on a former occasion;¹⁷ but technical works cannot be used to refute his opinion, unless his attention has been drawn in cross-examination to passages intended to be relied on.¹⁸ The weight of the evidence of an expert cannot be diminished by applying to it considerations to which his attention was never directed.¹⁹ "The Act makes no provision allowing

15. *Tilok Chand Charan Das v. Mahandu* 144 I.C. 741: 1933 L. 458; *Mohammad Ibrahim v. Altafan*, 47 A. 243: 83 I.C. 27: 1925 A. 24; *Altafan v. Ibrahim*, 75 I.C. 502: 1924 A. 116.

16. *United States Shipping Board v. The Ship "St. Albans"*, 131 I.C. 771: 1931 P.C. 189.

16a. *Laxmipat v. Maharashtra* 1958

S.C.J. 589.

17. Sections 155 and 146 (1).

18. *Grande Venkata Ratnam v. Corporation of Calcutta*, 46 I.C. 593: 19 Cr. L.J. 733; see *Rawat Sheo Bahadur Singh v. Beni Bahadur Singh*, 51 I.C. 419.

19. *Sarwar Khan v. E.*, 55 I.C. 273: 21 Cr. L.J. 257.

evidence of the opinion of one expert upon the qualifications of another",²⁰ though such evidence can be given in other system of evidence.²¹

Cross-examination of an expert by another expert.—In specific cases an expert can be allowed under a special power of attorney to cross-examine an expert in the same line of business coming as a witness for the other side.²²

46. Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

Illustrations

(a) The question is, whether A was poisoned by a certain poison.

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant.

(b) The question is, whether an obstruction to a harbour is caused by a certain sea-wall.

The fact that other harbours similarly situated in other respects, but where there were no such sea-walls, began to be obstructed at about the same time, is relevant.

COMMENTARY

Facts consistent or inconsistent with the opinions of experts.—Facts which are inconsistent with the opinions of experts, or which make the truth of their opinion probable, are declared relevant by this section which is based on the same principle as section 11. The section adopts a "roundabout way of stating that the opinion of an expert is open to corroboration or rebuttal".²³ Collateral facts which are generally inadmissible in evidence become receivable when the question is a matter of science, and the facts tend to illustrate or contradict the opinions of scientific witnesses. Illustration (b) is based on the well-known English case of *Folks v. Chadd*²⁴ in which the point in dispute being whether a sea-wall had caused the choking up of a particular harbour, engineers were called to give their opinions as to the effect of the wall; and evidence of the fact that other harbours on the same coast, where there were no embankments, had begun to be choked about the same time was admitted to show that the choking up of the harbour in question was not, as stated by the engineers, due to the making of the sea-wall. "If the point in dispute be whether a defendant was or was not in his right mind on a certain occasion, it is clear that, after proof by a medical man that madness is often of an hereditary character, evidence tending to show that none of the

20. Woodroffe, Ev., 8th Ed., 426 footnote (6).

21. Lawson, Expert Testimony, 2nd Ed., 275.

22. Thunnudeo v. Baldeo, 1944 N.L.J. 449.

23. Woodroffe, Ev., 9th Ed., 456.

24. 1782, 3 Doug., 157

defendant's ancestors or near relations had been insane would be admissible in support of the negative proposition; and, on a question of disputed paternity, once prove as a matter of science that children are apt to inherit the features or general appearance of their parents, and then, as a matter of course, evidence will be received of personal resemblance between the party in question and his alleged father".²⁵

Value of Passage from books.—The Learned Judges of the High Court disposed of this matter by saying that the doctor was comparatively young and that his statement was not in accord with the opinion expressed in books on 'Medical Jurisprudence' by authors like Modi and Lyon. But it cannot be said that the opinions of these authors were given in regard to circumstances exactly similar to those which arose in the case before the Supreme Court nor is this a satisfactory way of disposing of the evidence of an expert unless the passages which are sought to discredit his opinion are put to the expert.²⁶

47. When the Court has to form an opinion as to the person by whom any document was written or when signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

Explanation.—A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

Illustration

The question is, whether a given letter is in the handwriting of A, a merchant in London.

B is a merchant in Calcutta, who has written letters addressed to A and received letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon.

The opinions of B, C and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C or D ever saw A write.

COMMENTARY

Mode of proving Handwriting.—The ordinary methods of proving handwriting are :—

25. Taylor, § 335.

26. Bhagwas Das v. The State of

Rajasthan, 1957 Cr. L.J. 889; 1957 S.C.J. 515.

- (1) By calling as a witness a person who wrote the document or,
- (2) Saw it written, or signed, or,
- (3) Who is qualified to express an opinion as to the handwriting by virtue of section 47;
- (4) By a comparison of the handwriting as provided by section 73;
- (5) By admission of the person against whom the document is tendered.^{26a}
- (6) By expert evidence under section 45 (expert opinion is only relevant, but it is for the Court to determine whether a writing is genuine or not);
- (7) By internal evidence afforded by the contents of the document.²⁷
- (8) If signature of handwriting is to be proved by circumstantial evidence, the Court should be satisfied that circumstantial evidence irresistibly leads to the inference that the person in question must have signed or written it.²⁸
- (9) These modes of providing handwriting should be considered in the light of the recent Supreme Court decision that testimony as to handwriting can be based not only upon the examination of the originals but also on that of photographs which can now be received in evidence to prove authorship besides the contents of the documents provided that there is no trick photography and the photograph is above suspicion and the original cannot be obtained.²⁹

Besides the three modes of proof of authorship of a document other modes are, by examining the writer himself, or under section 73 by comparison of disputed writing with the writing of the alleged writer, or by the Court comparing the impugned writing with the admitted or proved writing, the Court may also direct any person present in the Court to write words or figures for enabling the Court to compare them with those alleged to have been written by such a person. Article 20 (3) of the Constitution of India forbidding testimonial compulsion is no bar against such procedure.³⁰

Modes of proving handwriting.—A writing may be proved in any of the following ways:—

- (i) by calling and examining the writer himself;
- (ii) by the evidence of a person who saw the document being written;
- (iii) under this section, by the evidence of a person acquainted with the handwriting of the writer;
- (iv) under section 73, by comparison of the disputed writing with the writing of the alleged writer;

26a. Barindra v. R. 14 C.W.N. 1114, 1138.

27. Mobarik v. S.A. 1958 S.C. 857: 1958 S.C.R. 328.

28. Baru Ram v Prasanna A. 1969

S.C. 93, 1959 S.C.R. 1403.

29. Laxmipat v. S.A. 1968 S.C. 938.

30. Kathi Kalu v. Bombay 1963 (1) S.C.J. 195.

- (v) under section 45, by expert evidence.³¹ See notes to section 45 under the heading "mode of proving a writing genuine or forged"; see also notes to section 67, where different ways of proving handwriting are fully discussed.

Proof of the genuineness of a document.—The proof the genuineness of a document is proof of the authorship of the document and is proof of a fact like that of any other fact. The evidence relating thereto may be direct or circumstantial. It may consist of direct evidence of a person who saw the document being written or the signature being affixed. It may be proof of the handwriting of the contents, or of the signature by one of the modes provided in sections 45 and 47 of the Indian Evidence Act. It may also be proved by internal evidence afforded by the contents of the document. This last mode of proof by the contents may be of considerable value where the disputed document purports to be a link in a chain of correspondence, some links in which are proved to the satisfaction of the Court. In such a situation the person who is the recipient of the document, be it either a letter or a telegram would be in a reasonably good position both with reference to his prior knowledge of the writing or the signature of the alleged sender, limited though it may be, as also his knowledge of the subject matter of the claim of correspondence, to speak to its authorship.^{31a}

Considering the manner in which section 47 is framed, it has been held by the Courts generally that it is enough for a witness to say in examination-in-chief that he is acquainted with the handwriting, and that if it is desired to challenge that statement of his he has to be cross-examined on that statement to show that he could not be acquainted with the handwriting in the circumstances of any particular case. The witness need not state in the first instance how he knows the handwriting, since it is the duty of the opposite party to explore on cross-examination the sources of his knowledge, if he is dissatisfied with the testimony as it stands. The Indian Law of Evidence is based on the English Law, and there is nothing in section 47 which goes against this principle which has been accepted by the English Courts. Following this principle, the Indian High Courts have also taken the same view.³²

In examining a disputed document the true test is not the extent of the similarities observed when compared with genuine documents, as forged documents usually are good imitations of genuine documents, but the nature and extent of the dissimilarities noticed. It is the differences which expose a true character of the document in question.

Handwriting, proof of.—Handwriting may be proved by the evidence of a person familiar with such writings (section 47) or by the testimony of an expert competent to make the comparison on a scientific basis (section 45) or by the Court by comparison with a writing made in its presence or admitted or proved to be the writing of the person.³⁴

31. Ganpatrao Khanderao Vijekar v. Vasanttrao Ganpatrao Vijaykar, 141 I.C. 747: 1932 B. 588; Khijruddin v. E., 53 C. 372: 92 I.L. 442: 1926 C. 139: 27 Cr. L.J. 268; Balak Ram v. Muhammad Said, 77 I.C. 872: 1923 L. 695; Sarojini Dasi v. Hasidas Ghosh, 49 C. 235: 66 I.C. 774 1922 C. 12; Brindra Kumar Ghose v. E., 37 C. 467: 7 I.C. 359: 11 Cr. L.J. 453.

31a. Mobarik Ali Ahmed v. The State of Bombay, 1958 S.C.R. 328: 1957 Cr. L.J. 1346: 1958 S.C.J. 111.

32. Pusaram v. Manmal, 1955 Raj. 86.

33. Raviappa v. Nilakanta Rao, A.I. R. 1962 Mys. 53.

34. Fakhruddin v. S.A. 1967 S.C. 1326.

Expert evidence would be of great use, since a comparison of the signatures without the help of an expert may not afford a conclusive test in the case of expert forgers; and this would be more so when the disputed signatures appear to belong to a class different from the group of admitted signatures.³⁵

The value of the opinion of an expert engaged by a party suffers from the defect that it is given by a remunerated witness, who knows beforehand why he has been called and what the party calling him wishes him to prove. It is not improbable that he has an unconscious bias in favour of the party. This detracts from the weight to be attached to such witness's opinion.³⁶

There may be cases in which the peculiarities in the handwriting of a person are so numerous, pronounced and striking that the Court may well reach a safe conclusion on its own comparison of the disputed writing and the standard writing.³⁷

Examination of handwriting expert is not necessary in every case of disputed writing—No adverse inference can be drawn against the prosecution for not obtaining expert's opinion. It is not necessary to examine a handwriting expert in every case of disputed writing. No adverse inference can be drawn against a party from the fact that the opinion of the handwriting expert has not been obtained.³⁸

Anthracene powder and ultra-violet lamp.—In the presence of panchyatdars the marked currency notes are treated with anthracene powder. Then the trap witness pays them into the hands of the briber direct. Then by means of pre-arranged signal the investigating officer rushes to the trapped person and examines his hands using an ultra-violet lamp. Now anthracene powder is one of many fluorescent substances which emit a light of a particular hue excited by the ultra-violet light. The ultra-violet light is the exciting agent. In other words, the true tests required to be satisfied by the prosecution to prove the presence of anthracene powder are³⁹ that no powder was detected on the hands, etc., of the trapped person with the naked eye. and⁴⁰ that when ultra-violet light was focused there was an emission of light blue fluorescent light. If evidence proved positive results of both these tests, then it would be right to infer that anthracene powder was present.

Competency: Witness must be acquainted with the handwriting.—This section makes relevant the opinion of a person who is acquainted with the handwriting of the person by whom the disputed document is alleged to have been written or signed,⁴¹ even though he is not an expert.⁴²

35. Venkataswami v. Lakshminarayan I.L.R. 1957 Andh. Pra. 399.

36. Abbayanand v. State of Bihar, 1959 Cr. L.J. 893.

37. Bisseswar Poddar v. Nabadwip, 64 C.W.N. 1067.

38. Srichand K. Khetwani v. State of Maharashtra, (1967) 1 S.C.J. 178.

39. Ramsingh v. State, 1960 Cr. L.J. 1207.

40. Ambalal v. State, 1961 (1) Cr. L.J. 59.

41. Khijiruddin v. E., 53 C. 372: 92 I.C. 442: 1926 C. 139: 27 Cr. L.J.

266; Jasoda Kuer v. Janak Missir, 4 P. 394: 92 I.C. 1034: 1925 P. 787; In the matter of Chanda Singh, 18 P.R. 1915 Cr.: 28 I.C. 722: 16 Cr. L.J. 338; Jalaluddin v. E., 15 I.C. 979: 13 Cr. L.J. 563; Shankarrao Gangadhar v. Ramji Harjivan, 28 B. 58; Lolit Mohan Sarkar v. Q.E., 22 C. 313.

42. Jagan Nath v. E., 101 I.C. 493: 1927 L. 724: 28 Cr. L.J. 461; In the matter of Chanda Singh, 18 P.R. 1915 Cr.: 28 I.C. 722: 16 Cr. L.J. 338.

It is, therefore, the duty of the party calling the witness to show that the witness is acquainted with the handwriting of the alleged writer.⁴³ But if, in examination-in-chief, the witness states that he is acquainted with the handwriting, his evidence will be admissible though he has not been questioned as to the means of his knowledge, unless the opposite party can show by cross-examining the witness that he is really incompetent to testify under the section.⁴⁴

A person is said to be acquainted with a person's handwriting when he has seen that person write at any time. The frequency and recentness of the occasions and the attention paid to the matter by the witness will affect the value, and not the admissibility, of the evidence.⁴⁵ Thus, in England such evidence has been admitted, though the witness had not seen the party write for twenty years, or had seen him write but once, and then only his surname.⁴⁶ Where a witness deposes that a certain document is in the handwriting of the accused, the degree of his acquaintance with that handwriting will affect the value, and not the admissibility of his evidence.⁴⁷ It is not impossible for a person, unable to read and write certain characters, to know and to recognize and prove the handwriting of another in those particular characters, if he had had the occasion to see the latter write.⁴⁸

In the **Explanation** to this section, the term "habitually" means "usually", "generally" or "according to custom". It does not refer to the frequency of the occasions but to the invariability of the practice. Thus, the opinion of a record-keeper who, in the course of his official duty, has to examine and file papers sent to him is relevant to prove the handwriting of the person whose papers are so filed, though the number of such papers may not be great.⁴⁹

Whilst evidence of opinion or belief is admissible for the purpose of proving handwriting where direct evidence of one who was present when the document was written is not available, an opinion based on mere inference is insufficient.⁵⁰

43. Hemraj Lodhi v. Ram Charan Lodhi, 1934 N. 204; Jasoda Kuer v. Janak Missir, 4 P. 394: 92 I.C. 1034: 1925 P. 787; Jalaluddin v. E., 15 I.C. 979: 13 Cr. L.J. 563; In re Basrur Venkata Row, 36 M. 159: 14 I.C. 418: 13 Cr. L. 226. But see Jagdish Das v. E., 1938 P.W.N. 403. It is not clear from the report in Balak Ram v. Muhammad Said, 77 I.C. 872: 1923 L. 695, whether the identifying witnesses were acquainted with the handwriting of the writer, but evidently the opinion as to the similarity of the signature could not be admitted under section 45, the witnesses not being "experts" as defined by section 45. There is no reference to section 73 in the report.

44. Shankarrao Gangadhar v. Ramji

Harjivan, 28 B. 58; Shyam Pratap v. Ben Nath, 1942 P. 449; Pusaram v. Manmal, 1952 Rajs. 102; Pusaram v. Manmal, 1955 Raj. 186.

45. Woodroffe, Ev., 9th Ed., 406; Kala Ram v. Fazal Bari Khan, 1941 Pesh. 38.

46. Taylor, § 1863; Kala Ram v. Fazal Bari Khan, 1941 Pesh. 38.

47. Saqlain Ahmad v. E., 1936 A. 165: 160 I.C. 264: 37 Cr. L.J. 263; Kala Ram v. Fazal Bari Khan, 1941 Pesh. 38.

48. Ram Chandra v. Jaithmal, 1934 A. 990.

49. E. v. Ponde, 89 I.C. 1042: 1925 B. 429: 26 Cr. L.J. 1474.

50. Deputy Commissioner Lucknow v. Chandra Kishore Tewari, 1947 O. 180 (F.B.).

Whether handwriting includes signature and mark?—The word “handwriting” in the sentence “any person acquainted with the handwriting, etc.” presumably includes both handwriting in general and signature.¹ Therefore, a person who is acquainted with the general style of a person’s writing or signature is competent under this section to identify that person’s general writing as well as his signature. It is true that very often the signature of a person possesses a great peculiarity and is very much different from his general style of writing, but this fact would affect the value of the witness’s testimony and not his competency. By section 2 of the Civil Procedure Code and section 3 of the Registration Act, “signature” is made to include the affixing of a mark, but there being no such extension of the meaning of “signature” in the present Act, the terms “sign” and “signature” should be confined to their ordinary sense. If this view be correct, opinion evidence of a person who claims acquaintance with the mark of another person would be inadmissible under this section;² but, if the mark was affixed in his presence, there would be no objection to his deposing that it was so affixed. A seal always has, and a mark may have a distinguishing feature; and if section 9 be interpreted liberally, the opinion of a person, who recognizes the seal or the mark by any distinguishing feature, may become admissible under that section as evidence of identity.³ See notes to section 67.

Evidence of handwriting expert should be corroborated.—It is necessary to observe that expert’s evidence as to handwriting is opinion evidence and it can rarely, if ever, take the place of substantive evidence. Before acting on such evidence, it is usual to see if it is corroborated either by clear direct evidence or by circumstantial evidence.⁴

The Supreme Court in *Ramchandra vs. State of U. P.* laid down that normally it is not safe to treat expert evidence as to handwriting as sufficient basis for a conviction. But it may, however, be relied upon along with other pieces of external and internal evidence relating to the document in question. Sections 45 to 47 lay down the method by which the signature in dispute could be proved. But even assuming that the signature of the person could legally be held to be proved, the principle which governs the appreciation of such circumstantial evidence in cases of this kind, cannot be ignored. It is only if the Court is satisfied that the circumstantial evidence would irresistibly lead to the inference that the person must have signed the document in question that the Court could legitimately reach a conclusion.⁵

It is settled view that it will not be safe to base a conviction on the uncorroborated testimony of a handwriting expert.⁶

In *Kishore Chand v. Ganesh Prasad* the Supreme Court held that conclusions based upon mere comparison of handwriting must at best be indecisive and yield to the positive evidence in the case.⁷ *Onnamala*

1. Woodroffe, *Ev.*, 9th Ed., 457.

2. See *Ponnuswami Goundan v. Kalyanasundra Ayyar*, 57 M. 662; 149 I.C. 571; 1934 M. 365; *Shahzadi v. Beni Prasad*, 154 I.C. 405; 1934 A. 390.

3. See Woodroffe, *Ev.*, 9th Ed., 458, 459; *Teshwadabai v. Ramchandra Tukaram*, 18 B. 66, 74.

4. *Shashi Kumar Banerjee v. Subhodh Kumar Banerjee*, A.I.R. 1964 S.C. 529.

5. *Ramchandra v. State of U.P.*, 1957 S.C. 381 1957 Cr. L.J. 559.

6. *Kameshwar v. State*, 1957 Cr. L.J. 276.

7. *Kishore Chand v. Ganesh Prasad*, A.I.R. 1954 S.C. 316.

Ammal v. Sithapathi Reddiar lays down that in evaluating the evidence of a handwriting expert on the question of the genuineness of the signature alleged to be that of the testator, the Court must keep in view the facts: (i) very few people sign in the same manner on all occasions, (ii) the opinion of an expert as to the genuineness of a signature should be received with great caution especially in a case where there is a positive evidence of persons who saw the testator sign the will, (iii) all the tests evolved by the experts in the matter of comparison of handwriting and signature are merely tentative in character, and lastly, (iv) opinion evidence is weak evidence.⁸

Explanation to Section 47.—Even the opinion evidence of a non-expert, becomes good evidence to go by, if the acquaintance of such witness with the signature of the executor is well proved within the meaning of Section 47, Explanation.⁹

One of the ways in which the knowledge of a person's handwriting may be acquired is by the witness having seen, in the ordinary course of business, documents which on evidence, direct or circumstantial, are proved to have been written by such person.¹⁰ The technical requirements of proof of handwriting are satisfied if a person alleges that he had seen another writing, and that, in his opinion, the writing to be proved is of that other person. This section deals only with the admissibility of a variety of opinion evidence and not with its value. In a case covered by this section, the value of the opinion, unlike that of the expert, depends upon the familiarity which a witness has acquired with the writing of the person about which the opinion is expressed and not upon the reasons which he can advance in support of the opinion. The evidence given by a witness, who has insufficient familiarity with the handwriting of the person about which he states should be discarded.¹¹

The evidence of person acquainted with the handwriting of the executant of a document is relevant and admissible. But, his opinion which is based on himself comparing the handwriting would not be admissible, since it would be more or less trenching upon the sphere of the expert.¹²

Sections 45 and 47—Expert evidence about genuineness of the handwriting. —Before accepting the evidence of an expert or that of a person familiar with the handwriting and signature of a person, as contemplated under Section 45 and Section 47, respectively of the Evidence Act, the Court is to apply its own observation to the admitted or proved, writings and to compare them with the disputed ones. The Court is not to become a handwriting expert but has to verify the premises of the expert in one case and to appreciate the value of the opinion in other.¹³

Section 45 and 47—Opinion of handwriting expert—Evidentiary value of—When Court to accept opinion.—Both under Section 45 and Section 47 the evidence is an opinion, in the former by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observations and experience. In either case the Court must satisfy itself

8. *Onnamalai Ammal v. Sithapathi Reddiar*, (1961) 1 M.L.J. 33.

9. *Dalim Kumar v. Smt. Nandarani Dassi*, 73 Cal. W.N. 877.

10. *Bhupen Narain v. Ek Narain Lal*, A.I.R. 1965 Pat. 332.

11. *Devi Prasad v. State*, A.I.R. 1967 All. 64.

12. *Rajmal v. Islam Mahomed*, 1958 Raj. L.W. 89.

13. *T. P. Singh v. J. K. Roy*, A.I.R. 1971 A & N 168.

by such means as are open that the opinion may be acted upon. One such means open to the Court is to apply its own observation to the admitted or proved writing and to compare them with the disputed one, not to become an handwriting expert but to verify the premises of the expert in the one case and to appraise the value of the opinion in the other case. This comparison depends on an analysis of the characteristics in the admitted or proved writings and the finding of the same characteristics in large measure in the disputed writing. In this way the opinion of the deponent whether expert or otherwise is subjected to scrutiny and although relevant to start with becomes probative. Where an expert's opinion is given, the Court must see for itself and with the assistance of the expert come to its own conclusion whether it can safely be held that the two writings are by the same person. This is not to say that the Court must play the role of an expert but to say that the Court may accept the fact proved only when it has satisfied itself on its own observation that it is safe to accept the opinion whether of the expert or other witness.¹⁴

Sections 47 and 67.—Identification of signature on document on basis of acquaintance with handwriting of signatory. Signatory not deposing to truthfulness of contents of document. Whether proof of signature amounts to proof of contents of documents. One D identified the signature of A to a typewritten document on the basis of his acquaintance with A's handwriting. It was sought to be urged by D that he had proved not only A's signature to the document but also its contents. A had not deposed to the truthfulness of the contents of the document;—Held, that what was formally proved was the signature of A and not the writing of the body of the document, and that even if the entire document was held formally proved, that did not amount to a proof of the truth of the contents of the document.¹⁵

Section 47 describes the various methods of proving the handwriting of a person. Section 67 says that if a document is alleged to be signed by a person, the signature of that person must be proved; it does not say that the signature must be proved by a person who actually saw that person affixing his signature. If sections 47 and 67 be read together, the reasonable inference is that the signature of the executant may be proved either by examining the person in whose presence the signature was affixed, or else by examining another person who is acquainted with the handwriting of the executant and is able to prove his signature by his opinion.¹⁶

Sections 45, 47 and 73.—Evidence of the identity of handwriting can be adduced in one of three ways. Proof of a writing by the admission of the writer or by the evidence of someone in whose presence he wrote is called direct evidence and is the best method of proof and if such evidence is available evidence of any other kind becomes unnecessary. But the law makes relevant two other modes. A writing may be proved to be in the handwriting of a particular individual by the evidence of persons

14. *Fakhruddin v. State*, 1967 M.P. L.J. 473, 1967 Mah. L.J. 571.

15. *In the matter of Mr. D and Mr.*

S. Advocates, 68 Bom. L.R. 228.
16. *Akshya Narayan v. Maheshwar*, A.I.R. 1958 Orissa 207, 212.

familiar with the handwriting of that individual (Section 47) or by the testimony of an expert (Section 45). A third method (Section 73) is comparison by the Court with a writing made in the presence of the Court or admitted or proved to be the writing of the person. Both under Sections 45 and 47 of the Evidence Act the evidence is an opinion, in the one case by scientific comparison and in the other by familiarity resulting from frequent observation and experience. In either case the Court must satisfy itself by such means as are open that the opinion may be acted upon. One such means open to the Court is to apply its own observation to the admitted or proved writing and to compare them with the disputed ones in order to satisfy itself on its own observation whether it is safe to accept the opinion of the expert or other witnesses. Thus in such cases the Court is not itself playing the role of an expert but is only coming to its conclusion, with the assistance of the expert, whether it can safely be held that the two writings are by the same person.¹⁷

48. When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

Opinion as to existence of right or custom, when relevant.

Explanation.—The expression “general custom or right” includes customs or rights common to any considerable class of persons.

Illustration

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section.

COMMENTARY

Opinion as to the existence of a right or custom; section 13 compared with section 48.—(i) Section 48 is limited in its application to general rights and customs;¹⁸ but section 13 includes all kinds of rights and customs—public, general and private.¹⁹ (ii) Section 48 refers to the opinion of a person as to the existence of a general right or custom, but section 13 refers to particular facts which are relied on in support of the existence of a right or custom.

Section 32 (4) compared with section 48.—(i) Section 32 (4) refers to the opinion of a person who cannot, for any of the reasons stated in that section, be called as a witness; but section 48 refers to the opinion of a living person who must himself appear in Court to testify.²⁰ (ii) Under sec-

17. *Fakhruddin v. M.P.*, 1967 (2) S. C.J. 885.

18. *Sankaracharya Swamigal v. Manali Saravana Mudaliar*, 51 I.C. 876.

19. *Gujju Lall v. Fatteh Lall*, 6 C. 171 (F.B.); *Samuel Cochrane v. Maharanee Brojo Soonduree Deb*, 23 W.R. 311.

20. Section 60; *Woodroffe, Ev.*, 9th Ed., 461; *Norton*, 227; *Parbhu Narain Singh v. Jitendra Mohan Singh*, 1948 O. 307; 22 Luck. 522; but see *Lali v. Murlidhar*, 28 A. 488; 33 I.A. 97 (P.C.); *Lekraj Kuar v. Mahpal Singh*, 5 C. 744; 7 I.A. 63 (P.C.).

tion 32 (4), the opinion must have been expressed before the commencement of the controversy; but section 48 imposes no such limitation, and, on the contrary, contemplates a case where the witness states his opinion after the commencement of the litigation.²¹ (iii) Section 32 (4) refers to a public custom or right, but the distinction between these two kinds of customs and rights is not of much consequence in view of the definition of "general custom and right" given in this section which would include all "public" customs and rights as they are understood in English law.²²

General custom or right.—"The opinions of persons likely to know about village-rights to pasturage, to use of paths, water courses, or ferries, to collect fuel, to use tanks and bathing ghats, mercantile usage and local customs, would be relevant under this section".²³ The section has no application to private rights.²⁴

Whether custom includes usage?—In *Dalglisch v. Guzuffer Husain*,²⁵ the Calcutta High Court defined the word "usage" in sections 178 and 183 of the Bengal Tenancy Act²⁶ as meaning "what the people are now or recently in the habit of doing in a particular place". "It may be", the Court remarked, "that this particular habit is only of a very recent origin or it may be one which has existed for a long time. If it be one regularly and ordinarily practised by the inhabitants of the place where the tenure exists, there would be usage within the meaning of the section". The Court remanded the case to the sub-Judge who had rejected the evidence on the ground that it did not refer to a "custom," and directed him to consider the evidence in the light of the provisions of section 48 of the Evidence Act. The rejected evidence not being before it, the High Court did not decide the question of its admissibility under section 48. In a subsequent case,²⁷ the case of *Dalglisch v. Guzuffer Husain* was taken to mean as laying down the proposition that opinion evidence on matters of "usage" is admissible under the present section. But it is submitted that the earlier case did not go to that extent, since the question of the applicability of section 48 to opinion evidence on a matter of "usage", as distinguished from opinion on a matter of "custom", was not decided by the High Court. The usage set up by the defendant in that case being the right to transfer an occupancy holding, opinion evidence in the case would have been admissible under the present section as evidence of a "general right", if not as evidence of a "general custom". If there is really a distinction between a "custom" and a "usage",²⁸ opinion evidence on a question of "usage" which does not amount to a "custom" does not seem to be within the terms of the section, unless the usage raises any question as to some "general right". Such evidence may, however, be relevant under the provisions of the next section.

Persons having special means of knowledge.—Opinions of persons who are in a position to know of the existence of a custom or usage in their locality are relevant under this section.²⁹ Opinion of the bar or its

21. See section 60.

22. Woodroffe, Ev., 9th Ed., 462.

23. Cunningham, Ev., 130.

24. Sankaracharya Swamigal v. Manali Saravana Mudaliar, 51 I.C. 876.

25. Dalglisch v. Guzuffer Hassain, 23 C. 427.

26. Act VIII of 1835

27. Sariatullah Sarkar v. Pran Nath Nandi, 26 C. 184.

28. See section 92, Prov. (5).

29. Sariatullah Sarkar v. Pran Nath Nandi, 26 C. 184; Dalglisch v. Guzuffer Hassain, 23 C. 427.

individual members is not admissible under section 48, on the question whether a sect of Mohammadans has adopted special customs of the Hindu Law.³⁰

Opinion is admissible, though based on hearsay.—It is competent for a witness to give his opinion on the existence of a custom and to state, as the ground of that opinion, information derived from deceased persons. But it must be the expression of independent opinion based on hearsay, and not mere repetition of hearsay.³¹ Where the evidence given by some of the plaintiffs supported a family tradition from generation to generation and which evidence was founded upon information derived from deceased persons and such tradition was also supported by documentary evidence, held that no part of the evidence in support of the plaintiffs' case could be held to be inadmissible.³²

Value of opinion evidence.—A tribal or family custom excluding a daughter or sister from inheritance may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence. No specific instances need be proved.³³ The opinion of persons, "whose position and profession are a guarantee of their acquaintance with custom and usage are of undoubted importance. Such persons are, so to speak, the depositaries of customary law, just as the text books are the depositaries of the general law"³⁴ But see **Bai Baji v. Bai Santok**,³⁵ and **Lachman Rai v. Akbar Khan**,³⁶ where it has been remarked that mere opinion evidence is not entitled to much weight and that the custom must be proved by specific instances.

Entries as to custom in a wajibularz or rewaj-i-am.—Under section 60, the person whose opinion is relevant must himself appear in Court to testify, and his opinion cannot be proved by derivative evidence.³⁷ But in the case cited,³⁸ entries in a **wajibularz** as to the existence of a custom were admitted by the Privy Council under this section, though the persons whose opinions were recorded in the **wajibularz** were not called as witnesses.³⁹ Where the interpretation of a clause of a **wajibularz** is ac-

30. Advocate General v. Jimbabai, 41 B. 181: 31 I.C. 106.

31. Garurdhwaja Prasad v. Superundhwaja Prasad, 23 A. 37: 27 I.A. 238 (P.C.); Amina Khatun v. Khalil-ur-Rahman Khan, 8 Luck. 445: 150 I.C. 282: 1933 O. 246; Pratap Chandra Deo Dhabal Deb v. Jagdish Chandra Deo Dhabal Deb, 82 I.C. 886: 1925 C. 116.

32. Srish Chandra v. Rakhal Ananda, (1937) 65 C.L.J. 520.

33. Ahmad Khan v. Channi Bibi, 6 L. 522; 52 I.A. 379: 91 I.C. 455: 1925 P.C. 267; Pannalal v. Chaman Parkash, 225 I.C. 8; Thunthi v. Dhani Ram, 1953 H.P. 66; Hubraji v. Chandrabali Upadhya, 6 Luck. 519: 130 I.C. 849: 1931 O. 89 (2). "Custom is not a matter to be submitted to the senses," Norton, 227.

34. Jugmohandas Mangaldas v. Mangaldas Nathubhoy, 10 B. 528, 543. 20 B. 53.

35. 1 A. 440.

36. 1 A. 440.

37. The present section refers to the evidence of a living witness produced before the Court, sworn and subject to cross-examination, Norton, 227.

38. Lali v. Murlidhar, 28 A. 488: 33 I.A. 97 (P.C.).

39. See also Sharfuddin v. Niamat Ali, 87 I.C. 8: 1925 O. 688; Lekraj Kuar v. Mahpal Singh, 5 C. 744: 7 I.A. 63 (P.C.). In Lali v. Murlidhar, 28 A. 488: 33 I.A. 97 (P.C.), the Privy Council did not refer to an earlier ruling Garuradhwaja Prasad v. Superundhwaja Prasad, 23 A. 37: 27 I.A. 238 (P.C.), in which section 60 was mentioned and the opinion admitted was of a "living person".

cepted by certain members of a family, the fact is admissible in evidence, in a subsequent suit between the members of the family, to show how a custom applying to the family was interpreted by the members of that family.⁴⁰ Entries in the *riwaj-i-am* of a district in the Punjab are admissible being the opinion, as to the existence of a general custom or right, of persons who would be likely to know of its existence if it existed.⁴¹

Rattigan's Digest.—Rattigan's Digest of Customary Law has been accepted as a book of unquestioned authority in the Punjab.⁴²

Opinion as to
usages, tenets, etc.,
when relevant.

49. When the Court has to form an opinion
as to—

the usages and tenets of any body of men or family,
the constitution and government of any religious or charitable foundation, or

the meaning of words or terms used in particular districts or by particular classes of people,

the opinions of persons having special means of knowledge thereon, are relevant facts.

COMMENTARY

Opinions as to usages, tenets, etc.—Under this section, the opinions of witnesses having special means of knowledge are relevant when the Court has to form an opinion as to: (i) the usages⁴³ of any body of men, e.g., usages of trade or agriculture, mercantile usages, or any other usages common to a body of men; (ii) usages of a family, e.g., the custom of primogeniture in the family of ancient zamindars; (iii) tenets of any body of men, which expression includes any opinion, principle, dogma or doctrine, held or maintained as truth by any class of men; (iv) tenets of a family; (v) the constitution and governments of any religious or charitable foundation; and (vi) the meaning of words or terms used in particular districts or by particular classes.⁴⁴

Under section 93, evidence may be given to show the meaning of foreign, technical, local or provincial expressions, and of words used in a peculiar sense; the present section makes the opinion of persons having special knowledge of such expressions and words admissible. The section "is particularly valuable in a country like India, in which there are so many different languages and in which justice is largely administered by Englishmen in languages other than English".⁴⁵ The Court can also resort for its aid to appropriate books or documents of reference on all matters of literature,⁴⁶ and to a dictionary for the meaning of words and expressions.⁴⁷

40. Sharfuddin v. Niamat Ali, 87 I.C. 8: 1925 O. 688.

41. Subhani v. Nawab, 1941 P.C. 21: 193 I.C. 436: I.L.R. 1941 L. 154

42. Salig Ram v. Mst. Maya Devi, 1955 S.C. 266: (1955) 1 S.C.R. 1191.

43. For the meaning of "usage", see Dalglish v. Guzuffer Hassain, 23

C. 427; Sariatullah Sarkar v. Pran Nath Nandi, 26 C. 184 and notes to the preceding section.

44. Woodroffe, Ev., 8th Ed., 443, 444; Norton, 228; see Tulasiram Das v. Ramprasanna Das, 1956 Orissa 41.

45. Field, Ev., 8th Ed., 390.

46. Section 57.

47. Field, Ev., 8th Ed., 390.

Usages of a family.—In order to prove a custom of this kind, the evidence must be cogent, aboveboard and unimpeachable. It should further be established that the custom was an ancient one. It is true that about things which happened a long time ago, it is difficult to expect direct testimony of persons who were living then and are dead. In such cases, a party has to remain content by examining witnesses who may otherwise be competent to speak either about the inheritance or the custom governing succession of the property belonging to any family. However, the question remains whether the witness who comes to depose about the custom heard of it from his ancestors and whether there was any occasion for his having any conversation with his ancestors about that custom.⁴⁸

Opinions of persons having special means of knowledge.—It is not the opinion of every person, that is made relevant by the section. The persons whose opinion is relevant under this section are those who have means of special knowledge of the matters stated in the section. Thus, the opinion of the members of a family as to the usages of that family is relevant as the opinion of persons having special means of knowledge.⁴⁹ The opinion may be based on knowledge or information derived from statements of deceased persons.⁵⁰ “It is admissible for a living witness to state his opinion as to the existence of a family custom and to state, as the ground of that opinion,¹ information derived from deceased persons; and the weight of the evidence would depend on the position and character of the witness and of the persons on whose statements he formed his opinion.² But it must be the expression of independent opinion based on hearsay and not mere repetition of hearsay”.³ If the opinion of the witness is based on statements made by deceased persons, it seems that the opinion would be admissible, irrespective of the fact that the statements were made by the deceased persons after the controversy had arisen;⁴ but if the witness merely repeats these statements without stating his independent opinion, it is apprehended that the statements would be inadmissible if they were made by the deceased after the controversy had arisen, since the admission of such statements would offend against the special provisions of the fourth clause to section 32.⁵

Gambling slips.—Under section 49 a police officer may give evidence that he has had a long experience amongst people who indulged in satta gambling in a particular district, and from that experience, supported by instances which he should be prepared to give so as to establish his means

48. Kameshwar Prasad v. Mithilesh Kishori, A.I.R. 1964 Pat. 150.

49. Shyamanand Das Mohapatra v. Rama Kanta Das Mohapatra, 32 C. 6.

50. Garuradhwaja Prasad v. Superundhwaja Prasad, 23 A. 37: 27 I.A. 233 (P.C.); Sarabjit Partap Bahadur Sahi v. Indarjit Partap Bahadur Sahi, 27 A. 203.

1. See section 51.

2. See section 158.

3. Garuradhwaja Prasad v. Superundhwaja Prasad, 23 A. 37: 27 I.A. 233 (P.C.).

4. Garuradhwaja Prasad v. Superun-

dhwaja Prasad, 23 A. 37: 27 I.A. 238 (P.C.). It is not clear from the report whether the statements were made after the controversy had arisen, but the observations made by the Privy Council supports the view stated above.

5. Protap Chandra Deo Dhabal Deb v. Jagdish Chandra Deo Dhabal Deb, 82 I.C. 886: 1925 C. 116. The observations of the Privy Council in Fanindra Deb Raikat v. Rajeswar Das, 11 C. 463, 481: 12 I.A. 72 (P.C.) seem to be opposed to this proposition.

of knowledge, he is satisfied that a system or code prevails among such persons, and he may then express an opinion which would be relevant under section 49 that certain slips were prepared in accordance with that system or code and had a certain meaning.⁶

In order to prove that the articles seized are instruments of gaming, it is not essential to examine an expert in every case. The fact may be proved by proper evidence.⁷

Meaning of betting terms.—The witness must claim to be an expert having special means of knowledge of the meaning of the words used in recording betting transactions. Otherwise his evidence is not admissible under this section.⁸

Entries as to custom in a wajibularz.—See notes to the preceding section.

50. When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact:

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, or in prosecutions under section 494, 495, 497, or 498 of the Indian Penal Code.

Illustrations

(a) The question is, whether A and B were married.

The fact that they were usually received and treated by their friends as husband and wife, is relevant.

(b) The question is, whether A was the legitimate son of B. The fact that A was always treated as such by members of the family, is relevant.

COMMENTARY

Family conduct; principle.—This section provides for the admission of a class of circumstantial evidence, when the Court has to form an opinion as to the relationship of one person to another. It is a reproduction of the English rule of "family conduct", which makes evidence of the conduct of members of the family admissible on questions of relationship. When the question is whether B is the wife and C the son of A, the fact that B was treated by the members and friends of the family as A's wife and C as his son, is relevant. When a Court has to form an opinion as to

6. Harilal Gordhan v. E., I.L.R. 1937 B. 670; 1937 B. 385; 171 I.C. 282; 38 Cr. L.J. 1047.

7. State of Gujarat v. Jaganbhai,

A.I.R. 1960 S.C. 1633.

8. Harakchand Radhakishan v. State, 55 Cr. L.J. 1347.

the relationship of one person with another, it is permitted to take into consideration the "belief" or "judgment" of a person having special means of knowledge. The opinion that the section makes relevant is opinion expressed by conduct as to the existence of such relationship and not merely as to that relationship. In order to enable the Court to infer the opinion the conduct must be of a tenor which cannot well be supposed to have been willed without the inner existence of the opinion. It is for the Court to weigh such evidence and to come to its own opinion as to the relationship in question.⁹

Essential requirements.—The essential requirements of the section are: (1) there must be a case where the court has to form an opinion as to the relationship of one person to another; (2) in such a case, the opinion expressed by conduct as to the existence of such relationship is a relevant fact; (3) but the person whose opinion expressed by conduct is relevant must be a person who as a member of the family or otherwise has special means of knowledge on the particular subject or relationship; in other words, the person must fulfil the condition laid down in the latter part of the section. If the person fulfil that condition, then what is relevant is his opinion expressed by conduct. Opinion means something more than mere retailing of gossip or of hearsay; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question. Now, the 'belief' or conviction may manifest itself in conduct or behaviour which indicates the existence of the belief or opinion. What the section says is that such conduct or outward behaviour as evidence of the opinion held is relevant and may, therefore, be proved.¹⁰

Section 50—Scope—Relationship of one person to another—Proof of conduct of witness having special means of knowledge—If can be proved by another.—A witness appearing in Court can make a statement to prove the conduct of another about the disputed relationship no matter such conduct may by a logical reasoning be said to be expressive of the opinion of that person about such relationship but such evidence will not be admitted as opinion evidence under Section 50 of the Act.¹¹

Section 32(5) and section 50 compared.—This section should be distinguished from the connected rule enacted in the fifth clause to section 32. The points of difference between the two are:—(i) what is admissible under section 32(5) is the statement of a deceased person, whereas, under the present section, the relevant fact is the **opinion** of persons, alive or deceased, expressed by conduct, the qualification of special means of knowledge being common to both provisions; (ii) under section 32(5), the statement must have been made before the question in dispute was raised, but, under the present section, so far as its strict relevancy is concerned, it is immaterial whether the opinion was expressed before or after the controversy arose.

The statement of a witness on a question of relationship can be admissible either under section 32(5) or section 50. If any particular statement

9. Chandulal v. Bibi Khatemonessa, I.L.R. (1942) 2 C. 299; 1943 C. 76; 205 I.C. 344; Ramadhar Chaudhary v. Janki Chaudhary, 1956 P. 49.

10. Dolgobinda Paricha v. Nimai Charan Misra, 1959 (Sup.) 2 S.C. R. 814; (1960) 1 S.C.A. 39.
11. Amar Singh v. Chhaju Singh, (1972) 74 P.L.R. 625.

does not fall within the purview of either of these provisions, it should be ruled out as inadmissible. Where the statement relates to the existence of relationship between two persons, one or both of whom could not have been seen by the witness, it cannot be presumed that he heard of the relationship from his own deceased ancestor. Where, therefore, the statement of the witness giving the pedigree is found to be inadmissible under section 32(5), but he deposes to facts which establish such treatment as is contemplated by section 50, it should be admitted to that extent.¹²

Sections 50 and 32(5).—Question whether M was adopted son of B—Document executed by W widow of B. stating that B had taken M in adoption during his life time is admissible under section 50. Further as W was dead and statement was made before any dispute regarding M's adoption was raised, it was also admissible under section 32(5).¹³

Mode of proving opinion.—The opinion made relevant by this section is "direct" evidence within the meaning of section 60, and it is immaterial whether it is proved by the person, whose opinion is sought to be proved, himself appearing in Court to state it, or by other evidence.¹⁴

Special means of knowledge.—Such evidence is admissible only, if the persons giving their opinion have special means of knowledge regarding the usages or tenets of any body of men or their family. The weight of such evidence would depend upon the position and character of the witness, and his evidence must be the expression of an independent opinion formed on what he has known or heard. Repetition of hearsay is still evidence.¹⁵

Oral evidence of witnesses who have no special means of knowledge and whose evidence can be said to be mere hearsay, is not admissible under this section, because that is not the opinion expressed by conduct as to the existence of relationship.¹⁶

Special means of knowledge about the relation is essential. A statement about the relationship between two persons by another person who is not shown to have any special means of knowledge, cannot be relevant.¹⁷

Persons having special means of knowledge.—The persons whose opinion is made evidence by the section must be shown to have "special" means of knowledge on the subject¹⁸ whether they are members of the family or are strangers.¹⁹ Members and friends of the family will be presumed to have special knowledge of the relationship; and their conduct will not only be relevant under this section but Courts should attach

12. *Chunna Kunwar v. Mukat Behari Lal*, 151 I.C. 338: 1934 A. 117.

13. *Namraj v. Rameshwar*, 1969 Raj. L.W. 507.

14. In *Q.E. v. Subbarayan*, 9 M. 9, Hutchins, J., seems to have held that the person whose opinion is relevant cannot himself be called to state his opinion; his opinion can be proved by other evidence only when such person is dead or cannot be called.

15. *Tulasiram v. Ramprasanna*, I.L.R. 1955 Cut. 653.

16. *Dukh Haran v. Bihasa Kuer*, A.I.R. 1963 Pat. 390.

17. *Bujhawan Singh v. Shyama Devi*, A.I.R. 1964 Pat. 301.

18. *Chandu Lal v. Bibi Khatemonnessa*, 1943 C. 76: I.L.R. (1942) 2 C. 299: 205 I.C. 344.

19. *Ramadhar Chaudhary v. Janki Chaudhary*, 1956 P. 49.

considerable importance to it in determining the question of relationship.²⁰ Relationship between T and D was in dispute. Nephew of D deposed that T addressed D as 'phuphar' and that D himself told him that T's father was his (D's) wife's brother. Opinion of nephew supported by T's conduct was held relevant.²¹

Value of the evidence relevant under this section.—When the legitimacy of a person is questioned after very considerable time, the defendant, in order to defend his status, should be allowed to invoke against the claimant every presumption which reasonably arises from the long recognition of his legitimacy by members of the family or other persons. These remarks would apply also when the adoption of a person is called in question.²² Where there is *prima facie* evidence of cohabitation as man and wife and a long course of treatment of the lady as wife and the children as legitimate, the presumption of marriage can be repelled only by evidence of the clearest character. Much weight must be attached to reputation among the relations on both sides, among all the friends and among all the acquaintances in the locality where the parties resided.²³

Value of evidence relevant under Section 50.—The section allows the leading of presumptive proof as regards marriage, legitimacy, adoption, etc. In *Thakur Gokal Chand vs. Parvin Kumari*, it was held that the presumption of lawful marriage from continuous cohabitation is rebuttable, if there are other circumstances which weaken or destroy it.²⁴

Instances of conduct held relevant.—Distribution and devolution of family property is very valuable evidence of "family conduct".²⁵ Where the fact to be proved was an adoption alleged to have taken place about 40 years before the suit, evidence of enjoyment of the properties of the adoptive father by the alleged adopted son and evidence of acquiescence of such enjoyment by persons who, but for the adoption, would have been entitled to possession of such properties was held admissible under this section.²⁶ But no presumption as to adoption arises where there is no clear and unambiguous evidence regarding acquiescence.²⁷ Where the Court has to decide whether one person is related to another, the fact that, according to the religious usage of the parties, the names of parti-

20. See *Muttuswamy Jugavera Yettappa Naicker v. Venkataswara Yet-taya*, 12 M.I.A. 203; *Khojah Hidayut Oollah v. Rai Jan Khanum*, 3 M. I.A. 295; *Fazilatunnessa v. Mst. Bibee Kamarunnessa*, etc., 9 C.W.N. 352.

21. *Ajmer Singh v. Jangir Singh*, 1952 Pepsu 76; *Parvin Kumari v. Gokal Chand Bala Ram*, 1949 E.P. 35.

22. *Rajendra Nath Holdar v. Jogen-dra Nath Banerjee*, 14 M.I.A. 67; *Mullangi Venkatarangam Chetty v. Vankatasubbammah*, 19 I.C. 740. Conduct of all parties is strong evidence of marriage. *Monji Lal v. Chandrabati Kumari*, 38 C. 700; 33 I.A. 122; 11 I.C. 502 (P.C.). "If the father is proved to have brought up the party as

his legitimate son, this amounts to a daily assertion that the son is legitimate", per Sir James Mansfield in *Berkeley Peerage Case*, (1811) 4 Camp, 401, 416.

23. *Imambandi v. Matasuddi*. 13 I.C. 678; 15 C.L.J. 611.

24. 1952 S.C.J. 331.

25. *Scshammal v. Kuppaenaiyyangar*, 91 I.C. 462; 1926 M. 475.

26. *Mullangi Venkatarangam Chetty v. Venkatasubbammah*, 19 I.C. 740.

27. *Girdhari Biswal v. Golak Biswal*, 1949 Orissa 27; but see *S. Ramakrishna Pillai v. Tirunarayan Pillai*, 1932 M. 198; 55 M. 40 and *Sri Kanchumarthi Venkata Seetharama Chandra Row v. Kanchumarthi Raju*, 1925 P.C. 201; 89 I.C. 817.

cular persons are usually recited or omitted during the performance of ceremonies, and the observance of pollution are instances of conduct relevant under the present section.²⁸ If the legitimacy of a certain type of marriage contracted by the members of a certain family is questioned, much may be gathered from the treatment accorded to the wives and from the way in which they described themselves in official documents and petitions and legal proceedings to which they were parties. Evidence of this kind is admissible as conduct under section 50 of the Evidence Act,²⁹ as it shows the repute in which such marriage was held in the family.³⁰ On the same principle, opinion expressed by conduct is relevant on a question of illegitimacy.³¹

General reputation as proof of relationship not admissible.—Section 50 does not make evidence of mere general reputation (without conduct) admissible as proof of relationship.³²

Opinion on relationship.—When a woman lives for a number of years in close association with a man and bears children, who are acknowledged by the man as born to him, relations and persons of the village treat them as such, there is a presumption of legitimacy, as vice and immorality are not usually attributed to such associations between a man and a woman. Where, therefore, the question was whether the defendant was the legitimate son of one M, evidence that the plaintiff, wife of M, herself, M and his brothers acknowledged and recognized the defendant as the legitimate son, and his mother as the legitimate wife of M, was admissible under this section.³³ The section can be pressed into service to decide the question of membership of a joint family which is a peculiar incident of Hindu Law and which is relevant to prove the relationship between persons. The opinion of persons expressed by conduct is also relevant.³⁴ Where, however, proof of marriage is an essential ingredient, there must be strict proof of marriage.³⁵

Opinion expressed by conduct.—Where witness testify to the conduct of a particular person living and being in joint possession of property with her daughter since the life time of the mother's husband, and witnesses testify that the husband died leaving behind the widow and her daughter, that his properties devolved jointly on the widow and the daughter, and that, after the widow's death, the daughter alone remained in possession, the evidence given satisfied the requirements of this section and as such is admissible to prove the parentage of the daughter. The devolution of family property is often valuable evidence of conduct within the meaning of this section.³⁶

Presumptions from conduct.—In respect of an ancient adoption the actual evidence of giving and taking may not be available, and if there is

28. Ramakrishna Aiyar v. Chinna Vengammal, 26 I.C. 110.

29. Ill. (b).

30. Maharaja of Kolhapur v. Sundaram Iyer, 48 M. 1: 93 I.C. 705: 1925 M. 47.

31. Gopalasami Chetti v. Arunachalam Chetti, 27 M. 32.

32. Dolgobinda Paricha v. Nimal Charan Misra, 1959 (Sup.) 2 S.C.

R. 814 (1960) 1 S.C.A. 39.

33. Sivalingiah v. Chowdamma, 1956 Mys. 17, 18.

34. Shriram Sardarmal v. Gouri Shankar 62 Bom. L.R. 336.

35. Phankari v. State A.I.R. 1965 J. & K. 105.

36. Bhogal v. Nabihan, A.I.R. 1963 Pat. 450.

sufficient evidence to show that for a long time the boy was treated as the adopted son at a time when there was no controversy, the burden will shift on the other side to show that the adoption did not take place.³⁷ In *Mutyala v. Subbalakshmi*, it was held that the proviso makes the opinion as to the relationship insufficient to prove marriage in proceedings under the Divorce Act or in prosecutions under section 494, 495, 497 or 498 of the Penal Code. This means that the proof of act of marriage is not to depend on opinion or conduct evidence.³⁸

Member of family deposing about facts heard from ancestors—Admissibility.—A member of the family can speak in the witness-box of what he has been told and what he has learned about his own ancestors, provided what he says is an expression of his own independent opinion (even though it is based on hearsay derived from deceased, not living persons) and is not merely repetition of the hearsay opinion of others, and provided the opinion is expressed by conduct. His sources of information and the time at which he acquired the knowledge (for example, whether before the dispute or not) would affect its weight but not its admissibility.³⁹

Personal knowledge not necessary.—Such persons may be members of the family or outsiders, but they must have had special means of knowledge on the subject of relationship. A member of the family can speak in the witness-box of what he has been told and what he has learnt about his own ancestors, provided what he says is an expression of his own independent opinion (even though it is based on hearsay, derived from deceased, not living, persons) and is not merely repetition of the hearsay opinion of others, and provided the opinion is expressed by conduct. His sources of information and the time at which he acquired the knowledge (for example, whether before the dispute or not) would affect its weight, but not its admissibility. Personal knowledge is not necessary.⁴⁰

Opinion based on hearsay not admissible.—Where the opinion of relationship is expressed by conduct, the belief or conviction must manifest itself in conduct or outward behaviour which indicates existence of belief or opinion. Where the opinion is based on hearsay and not on any belief or conviction, it is not admissible.⁴¹

Evidence of general repute.—In some cases,⁴² evidence of general repute on a question of relationship has been held admissible; but, except in the Madras case, it is not stated in these cases whether the evidence was admitted under this section or under the fifth or sixth clause to section 32. The present section deals with opinion expressed by conduct, and the evidence of general repute, as distinguished from evidence of conduct, does not seem to be within its purview, nor is there any other section in the

37. *Harihar v. Nabakishore*, I.L.R. 1962 Cut. 422.

38. *Mutyala v. Subbalakshmi* (1962) 1 Andh. W.R. 91.

39. *Sitaji v. Bijendra Narain Choudhar*, A.I.R. 1954 S.C. 601.

40. *Sitaji v. Bijendra Narain*, A.I.R. 1954, S.C. 601.

41. *Paras Ram v. Dayal Das*, A.I.R. 1965 S.C. 32.

42. *Mi Me v. Mi Shive Ma*, 39 C.

492: 39 I.A. 57: 14 I.C. 475 (P.C.); *Maharaja of Kolahpur v. Sundaram Iyer*, 48 M. 1: 93 I.C. 705: 1925 M. 497: *Ma Hmun v. Ma Ngwe Thin*, 1 R. 34: 74 I.C. 104: 1923 R. 171; *Sadik Husain Khan v. Hashim Ali Khan*, 38 A. 627: 43 I.A. 212: 36 I.C. 101: 1916 P.C. 27; *Imambandi v. Mutosuddi*, 13 I.C. 678: 15 C.L.J. 621.

Act which would make such evidence admissible.⁴³ Section 32 provides for the admission of statements by deceased persons, and is obviously inapplicable to evidence of general reputation. Since reputation is simply a cumulation of ordinary "perception testimonies" heard and gathered and reduced to a single implied assertion which is reported to the tribunal by the witness who perceived the cumulative assertions and since the special weakness of reputation is the anonymity of the original assertors, all the considerations for hearsay testimony apply and hence such evidence is not admissible.⁴⁴ Mere rumour or gossip that A and B are married unaccompanied by conduct on their part or on the part of their friends and relations is mere hearsay and therefore inadmissible.⁴⁵

Marriage; acknowledgment; adoption.—Where a man and a woman have cohabited continuously for a number of years, the law presumes in favour of marriage,⁴⁶ but not where marriage between the parties is not legally possible.⁴⁷ Where a man and a woman are treated as husband and wife by friends and relatives or other persons having special means of knowing their relationship, the evidence of the treatment is admissible under this section.⁴⁸ But where the evidence merely stated that A and B were regarded by the members of the brotherhood as husband and wife, the evidence was not held admissible as evidence of family conduct.⁴⁹ Mere statements that a person is or is not married are not admissible under section 50. What the Court wants under section 50 is the opinion expressed by the conduct of any person who, as a member of the family or otherwise, had special means of knowledge of the relationship.⁵⁰ Where the question is whether a man and a woman have been married or divorced, the opinion, as expressed by the conduct of the parties or by the conduct of members of the family or caste, is relevant under section 50.¹ Mere rumour or gossip that two persons are married is inadmissible but the fact that they were usually received and treated by their friends as husband and wife is admissible. Phrases such as "I learnt that they were

43. *Lakshmi Reddi v. Venkata Reddi*, 1937 P.C. 201: 168 I.C. 881; *Natbar Parichha v. Nimai Charan Misra*, 1952 Orissa 75; *Kunji Lal v. Suba Lal*, 1952 M.B. 12; *Ram-adhar Choudhary v. Janki Choudhary*, 1956 P. 49; *Chandulal v. Bibi Khatemonnessa*, I.L.R. (1942) 2 C. 299; *Seshammal v. Kuppanaiyyangar*, 91 I.C. 462: 1926 M. 475; see *Mohan Lal v. Tulsan*, 109 I.C. 774: 1928 L. 824.
44. *Chandulal v. Bibi Khatemonnessa*, I.L.R. (1942) 2 C. 299: 1943 C 76: 205 I.C. 344.
45. *Maung Maung v. Ma Sein Kyi*, 1940 R. 181.
46. *Harnam Singh v. Mst. Bhagi*, 10 L. 1007: 1936 L. 261: 161 I.C. 916; *Durga Bux Singh v. Suresh Bux Singh*, 1937 O.W.N. 1221; *Mohabbat Ali Khan v. Muhammad Ibrahim Khan*, 10 L. 725: 56 I.A. 201: 117 I.C. 17: 1929 P.C. 135; *Kyan Hoe Tsee v. Kyan Won Si*, 98 I.C. 762: 1926 R. 90; *Maharaja*

- of Kolahpur v. Sundaram Iyer, 48 M. 1: 93 I.C. 705: 1925 M. 497.
47. *Keolopati v. Harnam Singh* 1936 O. 298: 162 I.C. 527.
48. See *Maharaja of Kolhapur v. Sundaram Iyer*, 48 M. 1: 93 I.C. 705: 1925 M. 497.
49. *Lakshmi Chand v. Anandi*, 143 I.C. 815: 1933 A. 130; but see *Maharaja of Kolhapur v. Sundaram Iyer*, 48 M. 1: 93 I.C. 705: 1925 M. 497; *Parvin Kumari v. Gokal Chand Bala Ram*, 1949 E. P. 35: 50 P. L. R. 151; *Gokal Chand v. Parvin Kumari*, 1952 S.C. 231: 1952 S.C.R. 825: 1952 S.C.J. 331.
50. *Secretary of State v. Mst. Mariam*, 1937 S. 126: 169 I.C. 685: 31 S.L.R. 71; *Parvin Kumari v. Gokal Chand Bala Ram*, 1949 E.P. 35; *Gokal Chand v. Parvin Kumari*, 1952 S.C. 231: 1952 S.C.R. 825: 1952 S.C.J. 331.
1. *Janglia v. Jhingrya*, 63 I.C. 594: 1921 N. 71.

living together as man and wife" or "I learnt that they were man and wife" are not receivable in evidence. The witness must prove conduct on the part of the man and woman, or on the part of their friends and neighbours from which the Court may draw the conclusion about their relationship.² Under the Mohammadan Law, in all cases in which marriage may be presumed from cohabitation combined with other circumstances for the purpose of conferring upon the woman the status of a wife, it may also be presumed for the purpose of establishing paternity.³ The rule just stated is not, however, a rule of evidence, but is a rule of Mohammadan family law.⁴ Since this section is concerned with the conduct of persons other than those whose relationship is sought to be established, where acknowledgment is relied on to establish legitimacy, evidence of the conduct of the father and his treatment of the son and his mother cannot be received under this section, but it can be received as evidence of facts in issue.⁵ The evidence of the conduct of relations, friends, and neighbours will, of course, be relevant under the present section. Similarly, where the question is whether a **taluqdar** not having male issue has treated his daughter's son in all respects as his own within the meaning of section 22(4) of Act 1 of 1869, evidence of the **taluqdar's** treatment of the daughter's son will be received as evidence of facts in issue.⁶ Section 8 makes relevant the conduct of a party to the suit, and section 21 does not deal with admissions by conduct at all;⁷ hence, evidence of the conduct of an adoptive father, who is not a party to the suit, is not relevant under section 8 or section 21, nor is it relevant under the present section which is concerned only with the conduct of persons other than those whose relationship is in question. Such conduct may, however, be received under section 11, as rendering probable the **factum** of adoption, and possibly under section 114.⁸ Where the fact of adoption has been acquiesced in by the members of the adopting family for a long period there is a very strong presumption in favour of the validity of the adoption.⁹ Where a person has nearly for half a century enjoyed the status of an adopted son and has been treated as such all his life, and, at the time the question arises, it is not possible to get witnesses who were actually present at the time and could depose to the performance of the ceremony, it must be presumed that all the necessary ceremonies were duly and regularly performed at the time of his adoption.¹⁰ Where the plaintiff's case is that his ancestor was the son of a particular testator, the fact that the testator mentioned all the members of

2. Maung Maung v. Ma Sein Kyi, 1940 R. 181.
3. Mohabbat Ali Khan v. Muhammad Ibrahim Khan, 10 L. 725. 56 I.A. 201; 117 I.C. 17. 1929 P.C. 135; Wilson's Anglo-Mohammadan Law, section 84.
4. Fazilatunnessa v. Mst. Bibee Kamarunnessa, etc., 9 C.W.N. 352.
5. See Abdul Razak v. Aga Mahomed Jaffer Bijdanim, 21 C. 666. 21 I.A. 56 (P.C.); Fazilatunnessa v. Mst. Bibee Kamarunnessa, 9 C.W.N. 352; Khajah Hidayut Oolah v. Rai Jan Khanum, 3 M.I.A. 295; see also Imambandi v. Mutasuddi, 13 I.C. 678; 15 C.L.J. 621.
6. Pertab Narain Singh v. Subhao Kooer, 3 C. 626; 4 I.A. 228 (P.C.); Umrao Begum v. Irshad Husain,

- 21 C. 997; 21 I.A. 163 (P.C.).
7. See notes to section 17 under the heading "an admission is a statement, oral or documentary".
8. See Cunningham, Ev., 132; see, however, Mullangi Venkatarangam Chetty v. Venkatasubbamah, 19 I.C. 740.
9. Girdhari Biswal v. Golak Biswal, 1949 Orissa 27; S. Ramakrishna Pillai v. Tirunarayana Pillai, 1932 M. 198; 55 M. 40; Sri Kanchumarthi Venkata Seetharama Chandra Row v. Kanchumarthi Raju, 1925 P.C. 201; 89 I.C. 817.
10. Roshan Lal v. Samar Nath, 1937 L. 626; Lal Achal Ram v. Raja Kazim Husain Khan, 27 A. 271; 32 I.A. 113.

the family in the will but took no notice of the plaintiff's ancestor is evidence to show that either the plaintiff's ancestor was not the son of the testator or that he had predeceased the testator.¹¹ Evidence of notoriety of an adoption must be the evidence of a number of people who owing to their circumstances are in a position to say what was the attitude of the alleged adoptive parents towards the claimant. A mere statement that an opinion was held by the witnesses or other persons does not come within the scope of this section which is the only provision of the Evidence Act under which evidence of repute is admissible.¹²

Law presumes marriage.—Law presumes in favour of marriage and against concubinage, and long cohabitation raises a rebuttable presumption of wedlock. Where the descendants of a common ancestor do not challenge the legitimacy of a person, that is an important circumstance in favour of legitimacy. Acknowledgement and repudiation of legitimacy, both being conduct, are admissible in evidence under this section. So, where in a suit instituted by a father and his son, the father makes a statement in the plaint describing the son without mentioning whether he is an illegitimate son amounts to an acknowledgement that the son is legitimate. The fact that the descendants of a common ancestor who are defendants in the suit do not challenge the legitimacy in the suit is an important circumstance in favour of the legitimacy of the son.¹³ Every presumption ought to be made in favour of marriage when there has been a lengthened cohabitation, specially in cases where the alleged marriage took place so long ago that it must be difficult if not impossible to obtain a trustworthy account of what really occurred. Such presumption would be almost irresistible if the conduct of the parties is compatible with the existence of the relation of husband and wife.¹⁴ It is well-settled that continuous cohabitation for a number of years may raise the presumption of marriage.¹⁵

Proviso.—Sections 494, 495, 497 and 498 of the Indian Penal Code define and punish some of the offences against marriage. The proviso to the present section enacts that in prosecution for offences punishable under these sections of the Code, the opinion expressed by conduct is not sufficient proof of marriage. The proviso does not direct the Court to exclude such evidence of opinion, though the Court is directed not to base, on such evidence alone, a finding that the marriage took place.¹⁶ Where, therefore, a finding as to marriage is based on opinion evidence alone, the conviction would be illegal.¹⁷ The framers of the Evidence Act have endeavoured, in dealing with this subject, exactly to follow the English law. And in England, there has never been any doubt that, in an indictment for bigamy, the first marriage, and in proceedings founded upon adultery, the marriage, must be proved with the same strictness as any other material fact.¹⁸ In

11. Tracy Peerage Case, 10 Cl. & Fin., 191. Such evidence is admissible under section 11.

12. Maung Mya Maung v. Ma Mya Sein, 1936 R. 518.

13. Sheodhar Prasad v. Jagdhar Prasad, A.I.R. 1964 Pat. 318.

14. Rewa v. Galharsingh, 1960 M.P. L.J. 1389.

15. Gokul Chand v. Pravin Kumari, 1952 S.C. 231: 1952 S.C.J. 331.

16. Raghupat Singh v. E., 100 I.C. 535: 1927 O. 140: 28 Cr. L.J. 311.

17. Syed Munir v. E., 42 I.C. 760: 18 Cr. L.J. 1016.

18. E. v. Pitamber Singh, 5 C. 560 (F.B.).

all criminal cases, strict proof of the commission of the offence is required;¹⁹ hence, where marriage is an ingredient of the offence charged against the accused, a clear proof of the marriage is necessary,²⁰ the statements of the alleged husband and of the alleged wife together being insufficient.²¹ In a prosecution under section 497 or section 498, I.P. Code, it is not permissible to find the marriage proved merely on the presumption of marriage arising from cohabitation for a number of years.²² Section 488 of the Criminal Procedure Code is not included in the Proviso to the section. Hence for proof of marriage in a proceeding under section 488 Cr. P.C., the standard of proof need not be so high as required in proceedings under sections specified in the Proviso.²³

Effect of the proviso to Section 50.—The proviso to section 50 of the Evidence Act enacts only this much that the opinion evidence of the nature mentioned, which is otherwise made relevant by the main body of section 50 of the Act for the purpose of proving existence of relationship, shall not be sufficient to prove a marriage in a prosecution under section 494, I.P. Code. The proviso does not make the opinion evidence relating to the marriage either irrelevant or inadmissible. Therefore, the only effect of the proviso is that on the basis of the opinion evidence alone, the Court cannot hold in a prosecution under section 494 I.P. Code that the factum of the marriage has been proved. Hence the contention that the opinion of persons who testify to the marriage, the factum of which is in issue cannot be taken into consideration at all has to be ejected. Such testimony being relevant can be availed of along with other evidence to reach the conclusion that the factum of marriage had been proved.²⁴

Proviso to section 50 not applicable to contempt proceedings.—Injunction against husband restraining him from entering into second marriage—Disobedience of order—Contempt proceedings—Principle that strict proof is required in all criminal cases not to be extended to such a case—Proviso to section 50, Evidence Act is not applicable—Nor is contemner a person accused of any offence.²⁵

Sections 50 and 60—Applicability and scope—opinion evidence as to relationship—Mode of proof.—Section 50, however, does not state as to how the conduct or external behaviour which expresses the opinion of a person coming within the meaning of section 50 has to be proved. For this purpose, one is to turn to section 50. If the conduct relates to something which can be seen, it must be proved by the person who saw it, if it is something which can be heard then it must be proved by the person who heard it. If it refers to a fact which could be perceived by any other sense or in any

19. *E. v. Kallu*, 5 A. 233.

20. *Ganga Patra v. E.*, 112 I.C. 469: 1928 P. 481: 29 Cr. L.J. 1045; *Gopal v. E.*, 94 I.C. 603: 1925 R. 328: 27 Cr. L.J. 651; *Bhagu Dhondi v. E.*, 27 I.C. 837: 16 Cr. L.J. 213; *E. v. Isap Mahomed*, 31 B. 213; *Q.E. v. Santok Singh*, 18 B. W.N. 186; *Q.E. v. Dal Singh*, 20 A. 166; *R. v. Arshed*, 13 C.L.R. 125. For proof of a Mohammadan marriage, see *Badal Aurat v. Q. E.*, 19 C. 79.

21. *E. v. Pitamber Singh*, 5 C. 566

(F.B.); *E. v. Kallu*, 5 A. 233; but see *Ganga Patra v. E.*, 112 I.C. 469: 1928 P. 481: 29 Cr. L.J. 1045; *Syed Munir v. E.*, 42 I.C. 760: 18 Cr. L.J. 1016; *Q. E. v. Subbarayan*, 9 M. 9.

22. *Gul Mahomed v. E.*, 148 I.C. 753: 1934 S. 10: 35 Cr. L.J. 816.

23. *K. J. B. David v. Nilamoni Devi*, 1953 Orissa 10.

24. *Rabindra Kumar v. Smt. Prativa*, A.I.R. 1970 Tripura 30.

25. *Bhonrilal v. Mst. Kaushaliya*, 1969 Raj. L.W. 427.

other manner, it must be the evidence of a witness who says that he perceived it by that sense or in that manner, and if it refers to an opinion to the grounds on which that opinion is held, it must be the evidence of such person who holds such opinion on those grounds. The portion of section 60 which provides that the person who holds an opinion must be called to prove his opinion does not necessarily mean that it must be proved only by the person whose conduct expressed the opinion. It can be proved either by the testimony of the person himself whose opinion is evidence under section 50 or by some other person acquainted with the facts which express such opinion.²⁶

Sections 50 and 60—Inter-Relationship between these Sections.— If we remember that the offered item of evidence under section 50 is conduct then there is no difficulty in holding that such conduct or outward behaviour must be proved in the manner laid down in section 60; if the conduct relates to something which can be seen, it must be proved by the person who saw it; if it is something which can be heard, then it must be proved by the person who heard it; and so on. The conduct must be of the person who fulfils the essential conditions of section 50 and it must be proved in the manner laid down in the provisions in relation to proof. It appears to us that that portion of section 60 which provides that the person who holds an opinion must be called to prove his opinion does not necessarily delimit the scope of section 50 in the sense that opinion expressed by conduct must be proved only by the person whose conduct expresses the opinion. Conduct, as an external perceptible fact, may be proved either by the testimony of the person acquainted with the facts which express such opinion, and as the testimony must relate external facts which constitute conduct and is given by person personally acquainted with such facts, the testimony is in each case direct within the meaning of section 60. This is the true inter-relation between section 50 and section 60 of the Evidence Act.²⁷

Section 50 and 60—Proof of Marriage.—The proof required for marriage or relationship of husband and wife stands on a different footing from the ordinary standard of proof in respect of other facts. In fact, the rule of exclusion of hearsay evidence has been in a way relaxed in cases where marriage or relationship of one person to another has to be proved. It is not essential that the factum of marriage must be established by eye-witnesses or proof of the performance of ceremonies. Section 50 makes relevant the opinion expressed by conduct, i.e., external facts. It may be proved by the evidence of the person holding the opinion or by other persons acquainted with such facts evidencing conduct. Evidence as to the conduct of other members of the family made admissible under the section may be given either by the person whose conduct is in question or by a stranger who has special means of knowledge. In either case, the witness is to state facts observed by him and the opinion he has formed thereon. The opinion may be of a member of the family or an outsider; it is enough if he has special means of knowledge on the subject.²⁸

26. *Palaram Das v. Jayakrishna Das*, (1972) 38 C.L.T. 44.

27. *Dolgobinda Paricha v. Nimai Charan Misra*, 2 S. C. R. 814

(1960) 1 S.C.A. 39.
28. *Bomraj v. Gaya*, 1969 All W.R. (H.C.) 579.

Evidence of devolution of property—Sections 50 and 60.—Opinion on relationship expressed by conduct of person whose opinion is relevant must be a person who has special means of knowledge of relationship. Section 50 does not make evidence of mere general reputation (without conduct) admissible as proof of relationship. Devolution of family property is often very valuable evidence of conduct within meaning of section 50.²⁹

51. Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

Grounds of opinion,
when relevant.

Illustration

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

COMMENTARY

Principle.—Opinion is merely an inference which a person draws from certain facts; and the correctness of this inference depends upon an accurate observation of the facts and deducing correct conclusions from them. If, therefore, opinion is offered by a witness on a particular matter, the grounds on which that opinion is held by him must be examined in order to test the accuracy of the opinion. The opinions of the witnesses are entitled to little or no regard, unless they are supported by good reasons founded on facts which warrant them in the opinion of the jury. If the reasons are frivolous or inconclusive, the opinions of the witnesses are nothing.³⁰ The opinion of an expert carries little weight, unless it is supported by a clear statement of what he noticed and on what he based his opinion. The expert should put before the Court all the materials which induced him to come to his conclusion, so that the Court may form its own judgment on those materials.³¹ This section, though not a complete paraphrase of section 46, is based on a principle similar to the one enacted in that section. It “deals with the subjective grounds upon which the opinion is held, which can only generally be proved by the testimony of the person whose opinion is offered, whereas section 46 deals with objective external facts provable either by that person or others, which support or rebut the opinion of an expert”.³²

Grounds of opinion.—An Excise Inspector is an expert on the question whether a certain liquid is illicit liquor or not. But before he is in a position to give such an opinion as an expert, he has to examine it and has also to furnish the data on which his opinion is based. His bald statement without examining the liquid that the content was illicit liquor is not sufficient to prove that fact.³³

29 Md. Ayub Khan v. Abdus Samad Khan, 1969 B.L.J.R. 932.

30. Wingmore, § 1917, quoting Washington, J., in Harrison v. Rowan, 3 Wash. C.C. 587.

31. Ramkaran Singh v. E., 1935 N.

13: 154 I.C. 341; Titli v. Alfred Robert Jones, 1934 A. 273: 56 A. 428: 1953 I.C. 733.

32. Woodroffe, Ev., 8th Ed., 448.

33. Gobardhan v. The State, 1959 Cr. L.J. 13.

CHARACTER, WHEN RELEVANT

Introductory.—This set of sections, comprising sections 52 to 55 deals with the relevancy of the evidence of the character of parties. Rules governing the admissibility of the evidence of the character of witnesses are enacted in a subsequent part of the Act.³⁴ As a general rule, if the character of a party is in issue in a civil or criminal case, evidence of character, good or bad, will be admitted as evidence of a fact in issue; but when the character of a party is not in issue, the evidence will be rejected as inadmissible. There are, however, two exceptions to the latter part of this general rule: (i) evidence of good character may be given by an accused person,³⁵ and (ii) if the character of a person is such as affects the amount of damages which he ought to receive, evidence of such character will be received.³⁶

52. In civil cases the fact that the character of any person In civil cases concerned is such as to render probable or im-character to prove probable any conduct imputed to him is irre-conduct imputed ir-relevant, except in so far as such character ap-relevant, appears from facts otherwise relevant.

COMMENTARY

Scope of Sections 52, 53, 54 and 55.—The provisions of sections 52, 53, 54 and 55 make it clear that the evidence of general reputation and general disposition is relevant in a criminal proceeding. Under this Act, unlike in England, evidence can be given both of general character and general disposition. But the character evidence is very weak evidence. It cannot outweigh the positive evidence in regard to the guilt of a person. It may be useful, in doubtful cases, to tilt the balance in favour of the accused, or it may also afford a background for appreciating his reactions in a given situation. It must give place to acceptable positive evidence.³⁷

Evidence of character is admissible where character is a fact in issue.—The rule of exclusion of evidence of character does not apply when, according to the rule of substantive law applicable to the case, the character of a party is a fact in issue. Under the general law of defamation the truth or otherwise of an imputation of bad character is a fact in issue; and evidence on this point will therefore be received.³⁸ Thus, in an action for a libel, where the language complained of stated that the defendant parted with the plaintiff "on account of her incompetency, and her not being lady-like or good tempered," general evidence of her competency, good temper and manners was received; and where, in a similar action, the words charged the plaintiff generally with dishonesty and misconduct while in service, a witness, with whom she had previously lived, was allowed to testify to her antecedent general conduct.³⁹ Under the Punjab custom, the unchastity of a widow involves a forfeiture of her life interest in her hus-

34. See sections 145, 146, 148, 153 and 155.

35. Section 53.

36. Section 55.

37. Bhagwan Swarup v. State of

Maharashtra (1964) 2 S.O.R. 378; (1964) 2 S.C.R. 771.

38. Cockle's Cases & Statutes, 4th Ed., 111.

39. Taylor, § 355.

band's property;⁴⁰ and, under Hindu law, a forfeiture of her right to maintenance.⁴¹ Therefore, where the question is whether a widow governed by the Punjab custom has forfeited her life interest, or a Hindu widow her right to maintenance, by reason of her unchastity, evidence of bad character will be admitted without question. Similarly, a Mohammadan woman, otherwise entitled to the custody of a boy or girl, is disqualified by gross and open immorality;⁴² and where her right to the custody of a minor is attacked on this ground, evidence of her immoral character will be admitted as a matter of course.

Evidence of character inadmissible when character not in issue.—When the character of a party is not in issue but the evidence of character is tendered for the purpose of rendering probable or improbable any conduct imputed to him, it will be rejected as inadmissible. If A sues B on a promissory note the execution of which is denied by B, evidence of the fact that A is a habitual forger of promissory notes will be inadmissible.⁴³ In a divorce case, the husband cannot, in disproof of a particular act of cruelty, tender evidence of his general character for humanity.⁴⁴ As to the meaning of "character", see section 55, Explanation.

Unchastity of allegation of woman made against second wife in written statement of husband in maintenance suit filed by former—question not considered and suit dismissed as not maintainable—Title suit filed by daughter—Question whether second wife was unchaste—Allegations in written statement in maintenance suit held not admissible in evidence in the title suit.⁴⁵

Section 52 and 155.—Section 155 lays down a different method of discrediting a witness by allowing independent evidence to be adduced. Section 155 is not an exception to this section. Though independent evidence of the character of a plaintiff is not admissible under this section, if he offers himself as a witness, he may be discredited by answers elicited in his cross-examination.⁴⁶

In criminal cases previous good character relevant.

53. In criminal proceedings the fact that the person accused is of a good character is relevant.

COMMENTARY

Previous good character.—Section 53 accords with the English rule: viz. "Though general evidence of bad character is not admitted against the prisoner, general evidence of good character is always admitted in his favour". This would, no doubt, be an inconsistency justifiable, or at least intelligible, on the ground of the humanity of English law, if such evidence were not often of great importance as tending to explain conduct. In criminal proceedings a man's character is often a matter of importance

40. *Gurdit Singh v. Khewan Singh*, 57 P.W.R. 1913: 19 I.C. 253.

41. Mulla, *Hindu Law*, section 561.

42. Wilson's *Anglo-Mohammadan Law*, section 108.

43. Section 11 is inapplicable to evidence of this kind.

44. Woodroffe, *Ev.*, 8th Ed., 452.

45. *Lakshamma v. Chinnappayya* (1970) 2 Andh. W.R. 94.

46. *Guntaka Husseni v. Buseti, Yerrajah*, (1954) Andhra 39: (1954) 2 M.L.J. Andh. 39.

in explaining his conduct and in judging his innocence or criminality. Many acts of an accused person would be suspicious or free from all suspicion when we come to know the character of the person by whom they are done.⁴⁷

Under section 53 of the Evidence Act evidence as to the good character of the accused is always relevant in a criminal case, for the purpose of showing the state of his mind. In criminal proceedings a man's character is often a matter of importance in explaining his conduct and in judging his innocence or criminality. Many acts of an accused person which look suspicious become free from all suspicion when we come to know the character of the person who had done them. Not only that, but even on the question of punishment, an accused must be allowed to prove his general good character. Therefore, when a judge thinks that the evidence of character will not materially affect the result of a case, he should not ordinarily shut out the evidence of defence witnesses whom the accused desires to examine for the purpose of establishing his good character.⁴⁸

Where character not in issue.—In a case, where it was alleged that certain documents had been obtained from a person while he was under the influence of drink, and the allegation stood disproved, it was held that evidence could not be let in to prove his general bad character, with a view to establish want of consideration for the transaction.⁴⁹

Value of the evidence of good character.—In criminal cases good character of the accused is always treated as a relevant fact. If the case is clearly established against the accused, evidence of good character will not carry any weight,⁵⁰ but in doubtful cases such evidence is of great importance,¹ since it strengthens the presumption of innocence² and can explain acts and conduct,³ which are otherwise suspicious and even *prima facie* criminal. If vicious intention is an ingredient of the offence charged against the accused, evidence of good character is useful in showing the improbability of the existence of that intention.⁴ A man's character is often a matter of importance in explaining his conduct and in judging his innocence or criminality.⁵ In all cases, when evidence is admitted touching the general character of the party, it ought manifestly to bear

47. *Habeeb Mohammad v. State of Hyderabad*, 1953 S.C.J. 678; 35 Cr. L.J. 338; 1954 M.W.N.

48. *Habeeb Mohammad v. State of Hyderabad*, 1954 Cr. L.J. 338.

49. *Abdul Shakur v. Kotwaleswar*, A.I.R. 1958 All. 54.

50. *R. v. Nur*, 8 B. 223, 227; *R. v. Turner*, (1664) 6 How. St. Tr. 565, 613; *The Governor of Bengal v. Umeshchunder Mitter*, 16 C. 310.

1. *R. v. Turner*, (1664) 6 How. St. Tr. 565. "A murder is committed under such circumstances that one of the two persons must be the murderer; one of them is a habitual offender of notorious evil life, of ferocious disposition, of lawless habits; the other is a person of

refinement, delicacy and saintliness. Who can doubt that, in such a case, the character of the person concerned is a main element in the consideration of innocence or guilty?" *Cunningham*, 135.

2. *R. v. Rowton*, 10 Cox C. C. 233; *Taylor*, § 352.

3. *Cunningham*, 135.

4. See *Woodroffe, Ev.*, 9th Ed., 78. "A man is found in possession of stolen goods. He says he found them and took charge of them to give them to the owner. If he is a man of very high character, this may be believed". *Field, Ev.*, 8th Ed., 393.

5. *Habeeb Mohammad v. State*, 1954 S.C. 51.

reference to the nature of the charge against him; as for instance, if he be accused of theft, that he has been reputed an honest man; if of treason, a man of loyalty. It should also relate to the same period as the supposed offence; for, as Lord Holt once remarked, "a man is not born a knave; there must be time to make him so; nor is he presently discovered after he becomes one".⁶

In proceedings under section 110, Criminal Procedure Code, the character of the person proceeded against is directly in issue and therefore evidence of good character is material.⁷ In prosecutions for political offences the evidence of good character, education, etc., does not strengthen the presumption of innocence.⁸ The mere fact that a person has enjoyed the confidence of his superiors, or that he had in fact led a life of honesty during the past, is no reason to suppose that he will not succumb to temptation at the close of his career; but before a man of this type and such antecedents is adjudged guilty, the evidence against him must be of an unimpeachable character.⁹ Good character in this section presumably includes good reputation which a man may bear in his own circle as well as his real disposition as distinct from what his friends and neighbours may think of him.¹⁰

Sections 53 and 55, Explanation—Difference between character and disposition—Evidence of good character—value of.—Under the Indian Evidence Act, evidence can be given both of general character and general disposition. Disposition means the inherent qualities of a person; reputation means the general credit of the person amongst the public. There is a real distinction between reputation and disposition. A man may be reputed to be a good man, but in reality he may have a bad disposition. The value of evidence as regards disposition of a person depends not only upon the witnesses' perspicacity but also on their opportunities to observe a person as well as the person's cleverness to hide his real traits. But a disposition of a man may be made up of many traits, some good and some bad, and only evidence in regard to a particular trait with which the witness is familiar would be of some use. But, in any case, the character evidence is a very weak evidence; it cannot outweigh the positive evidence in regard to the guilt of a person. It may be useful in doubtful cases to tilt the balance in favour of the accused or it may also afford a background for appreciating his reactions in a given situation. It must give place to acceptable positive evidence.¹¹

¹²[54. In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Previous bad character not relevant except in reply.

6. Taylor, § 351.
7. *Shiam Lal v. E.*, 2 I.C. 225: 9 Cr. L.J. 528.
8. *In re Joganath Iiyar*, 4 I.C. 700: 11 Cr. L.J. 730.
9. *Mangat Rai v. E.*, 10 L.L.J. 262: 110 I.C. 676: 1926 L. 647; dissented from in *E. v. Khurshid Hussain*, 1947 L. 410: 48 Cr. L.J. 882.
10. See *Stirland v. Director of Public*

11. *Prosecutions*, 60 T.L.R. 461.
11. *Bhagwan Swarup Lal Bishan Lal v. The State of Maharashtra*, (1965) 1 Cr. L.J. 608 (1964) 2 S.C.R. 178 (1964) 2 S.C.J. 771.
12. Substituted by the Indian Evidence Act (1872) Amendment Act, 1891 (3 of 1891), section 6, for the original section.

Explanation 1.—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation 2.—A previous conviction is relevant as evidence of bad character.]

COMMENTARY

Evidence of bad character.—This section enacts that the bad character of an accused person is irrelevant, and that evidence of this fact cannot be given, unless his bad character is a fact in issue, or unless evidence of good character has been given by him under the preceding section. The rule is founded on the reason that such evidence tends to prejudice the tribunal against the accused¹³ and interferes with the formation of a calm and dispassionate judgment on the case.¹⁴ Section 310 of the Criminal Procedure Code, whereby all knowledge of previous conviction is withheld from jurors and assessors during the trial of the accused, is based on the same principle.¹⁵ Since "a man's bad character is a weak reason for believing that he was concerned in any particular criminal transaction"¹⁶ an accused person cannot be convicted of the offence charged against him, simply because he has been guilty of another offence; and proof of the commission of an independent offence cannot be offered to show that, by reason of the commission of such independent offence, the accused is more likely to have committed the offence for which he is on trial. Evidence of the commission of such independent offence is, therefore, inadmissible as substantive evidence of the offence charged.¹⁷ The guilt of a person should be established by proof of the facts alleged and not by proof of his bad character.¹⁸ Evidence of general dishonesty of character is irrelevant for the purpose of raising a presumption of dishonesty in the particular case under trial.¹⁹ Similarly, the statement that the accused was reputed to be a thief cannot be legally admitted in evidence even if the statement be made by a witness in his cross-examination by the defence.²⁰ Where, in a case of perjury, a document made by the accused was given in evidence for the purpose of showing the untruthful character of the accused, the document was rejected.²¹

13. *Gaya Lal v. E.*, 1946 O. 233; *Mung E. Gyi v. E.*, I.R. 520: 81 I.C. 106: 1924 R. 91: 25 Cr. L.J. 618; *Amritlal Hazra v. E.*, 42 C. 957: 29 I.C. 513: 16 Cr. L.J. 497; for cases before the Act see *Q. v. Kulum Sheikh*, 10 W.R. Cr. 39; *Q. v. Bykunt Nath Banerjee*, 10 W.R. Cr. 17; *Q. v. Phoolchand*, 8 W.R. Cr. 11; *Q. v. Beharee Dosadh*, 7 W.R. Cr. 7; *Q. v. Runjeet Singh*, 6 W.R. Cr. 72.

14. *Q. E. v. Ram Saran*, 8 A. 306, 314.

15. *Maung E. Gyi v. E.*, I.R. 520: 81 I.C. 106: 1924 R. 91: 25 Cr. L.J. 618; *Teka Ahir v. E.*, 60 I.C. 331: 22 Cr. L.J. 219.

16. *Stephen's General View of the Criminal Law of England*, 309;

310.

17. *Maung E. Gyi v. E.*, I.R. 520: 81 I.C. 106: 1924 R. 91: 25 Cr. L.J. 618; *Gungaram Hari Parit v. E.*, 62 I.C. 545: 22 Cr. L.J. 529; *Baharuddin Mandal v. E.*, 22 I.C. 187: 36 M. 471: 15 Cr. L.J. 43; *Girdhari Lal v. E.*, 12 P.R. 1913 Cr.: 6 I.C. 964: 11 Cr. L.J. 428; *Reg. v. Parbhudas Ambaram*, 11 Bom. H.C. 90.

18. *Amritlal Hazra v. E.*, 42 C. 957: 29 I.C. 513: 16 Cr. L.J. 497; *Q. v. Bykunt Nath Banerjee*, 10 W. R. Cr. 17.

19. *U.B.R.* 1908, 2nd Quar. Ev., 1.
20. *Mi Myin v. E.*, 2 I.C. 349: 9 Cr. L.J. 576.

21. *E. v. Bankatram Lachiram*, 28 B. 533: 6 Bom. L.R. 379.

Evidence of the fact that the accused is under police surveillance is evidence of bad character and therefore, inadmissible.²² It should, however, be remembered that evidence which is otherwise relevant cannot become irrelevant merely because, besides being relevant on the point on which it is tendered, it incidentally shows the accused to be of a bad character.²³ If the evidence of motive incidentally discloses the bad character of the accused, the evidence does not, for that reason, become irrelevant.²⁴ Where the accused, charged with sedition, pleads loyalty, evidence of previous seditious speeches becomes admissible.²⁵ At the trial of an offence under section 4 of the Bombay Prevention of Gambling Act (IV of 1887), evidence was tendered by the prosecution that the accused was previously convicted of a similar offence. Jacob, J., excluded the evidence as irrelevant under this section; but, on the case being referred under section 429 of the Criminal Procedure Code, Aston, J., held the evidence admissible, not under the present section but under section 5, 11 and 14.²⁶ In a prosecution for an offence of rioting, the statement by a witness that he brought a case under section 107, Cr. P. Code, against the accused who was bound down is admissible, not for the purpose of proving the bad character of the accused but as part of the *res gestae*.²⁷ Where the gambling habits and the previous bad conduct of the accused were given in evidence not for the purpose of showing that he was a bad character and therefore likely to commit offence of the kind of which he was convicted, but for the purpose of showing that he was in straitened circumstances and needed money for his gambling transactions, the evidence was held admissible.²⁸ Evidence that the accused persons ran cocaine and gambling dens is admissible if the case against them be that they were thrown together into a conspiracy by frequenting or running such dens.²⁹ Evidence of the fact that the accused is a member of a criminal tribe is evidence of bad character and should not be tendered before the jury until after the verdict.³⁰ The conduct of a Magistrate in looking into the confidential police record of the accused maintained in the police station and allowing his judgment to be influenced thereby is a violation of the fundamental principles of criminal jurisdiction.³¹

When the bad character of the accused is not in issue, he cannot be referred to as a *goonda* in the charge to the jury.³²

Evidence of bad character, when admissible; Explanation I.—A fact otherwise relevant under any section as to relevancy of facts cannot be shut out merely because it might incidentally cast a reflection on the good character of the accused.³³ When the character of the accused person is a fact in issue,³⁴ e.g., in security proceedings under Chapter VIII (sections 100—119) of the Criminal Procedure Code, evidence of bad character be-

22. *Phekan Singh v. E.*, 133 I.C. 449: 1931 P. 345: 32 Cr. L.J. 1025.

23. *Saroj Kumar Chakravarty v. E.*, 59 C. 1351: 139 I.C. 873: 1932 C. 474: 33 Cr. L.J. 854.

24. *Jagwa Dhanuk v. E.*, 5 P. 63: 93 I.C. 884: 1926 P. 232: 27 Cr. L. J. 484.

25. *E. v. Govindanand*, 84 I.C. 448: 1921 S. 199: 26 Cr. L.J. 304.

26. *E. v. Alloomiya Husan*, 28 B. 129.

27. *Samaruddin v. E.*, 40 C. 367: 17

I.C. 565: 13 Cr. L.J. 821.

28. *Daulat v. R.*, 2 L.L.J. 653.

29. *Sital Singh v. E.*, 46 C. 700: 54 I.C. 53: 21 Cr. L.J. 5.

30. *Mosaheb Dome v. E.*, 183 I.C. 660.

31. *Gaya Lal v. E.*, 1946 O. 233.

32. *Nimoo Pal Majumdar v. State*, 1955 C. 559.

33. *Mangal Singh v. State of Madhya Bharat*, 1957 Cr. L.J. 325.

34. *Beni Madho v. E.*, 146 I.C. 1064: 1933 O. 355: 35 Cr. L.J. 273.

comes admissible.³⁵ Similarly, where, by reason of a previous conviction, the accused is liable to enhanced punishment under section 75, Indian Penal Code, the previous conviction is provable as a fact in issue.³⁶ A previous conviction may, after the accused is found guilty, be given in evidence to determine the amount of punishment to be awarded. Such conviction is relevant to the question whether the provisions of section 562, Criminal Procedure Code, should be applied to the case and is also relevant on the general question of punishment.³⁷ When evidence of a previous conviction is given to ask for an enhanced sentence, the evidence has no bearing on the question whether the accused has or has not committed the offence; this question must be decided independently of the evidence of conviction.³⁸

The prosecution cannot give evidence of bad character in the first instance and as part of their case, but when the accused gives evidence of his good character under the preceding section, the prosecution may rebut it by evidence of bad character³⁹ since, by adopting this course, the accused invites and challenges inquiry on the subject. Under the preceding section the prisoner has the option to give or withhold evidence of good character. If he elects to give such evidence the prosecution then has the option of giving or withholding evidence of his bad character in rebuttal; if he elects to withhold it, the prosecution's option does not come into play, for there is nothing to rebut, and evidence of bad character is consequently excluded. This is not quite adequately expressed by saying that "evidence of the prisoner's character, good or bad, is always admissible at the prisoner's option".⁴⁰ An accused who puts his character in issue must be regarded as putting the whole of his past record in issue. He cannot assert his good conduct in certain respects without exposing himself to inquiry as to the rest of his record so far as this tends to disprove a claim for good character. But it is no disproof of good character that a man has been suspected, or accused of a previous crime. Such questions as "Were you suspected?" or "Were you accused?" are inadmissible because they are irrelevant to the issue of character.⁴¹ Where evidence of bad character, e.g., of orders under the preventive sections of the Cr. P. Code, has been wrongly introduced by the prosecution, the evidence will become admissible if the accused decides to lead evidence of good

35. See section 117 (3), Cr. P. Code; *Ajay Kumar Singh v. E.*, 146 I.C. 1070: 1933 A. 674 (2): 35 Cr. L.J. 284; *E. v. Kumera*, 51 A. 275: 125 I.C. 19: 1929 A. 650: 31 Cr. L.J. 755.

36. *Dehri Sonar v. E.*, 50 C. 367: 77 I.C. 991: 1923 C. 707: 25 Cr. L.J. 527; see *Bhura Singh v. E.*, 1935 S. 115: 158 I.C. 282; *Rahim Bakhsh v. E.*, 109 I.C. 349: 1928 O. 215: 29 Cr. L.J. 525; L.B.R. (1872: 1892) 449.

37. *In re Suban Sahib*, 52 M. 358: 115 I.C. 483: 1929 M. 306: 30 Cr. L.J. 471; *E. v. Nga Ba Shein*, 6 R. 391: 111 I.C. 453: 1928 R. 200: 29 Cr. L.J. 869; *Rahim Bakhsh v. E.*, 109 I.C. 349: 1928 O. 215: 29 Cr. L.J. 525; *Ismail Alibhai v.*

E., 30 B. 326: 26 I.C. 995: 16 Cr. L.J. 83; but see *E. v. Allomiya Husan*, 28 B. 129.

38. *In re Suban Salib*, 52 M. 358: 115 I.C. 483: 1929 M. 306: 30 Cr. L.J. 471; *Rahim Bakhsh v. E.*, 109 I.C. 349: 1928 O. 215: 29 Cr. L.J. 525.

39. *Cockle's Cases and Statutes*, 4th Ed., 114; *Bhura Singh v. E.*, 1935 S. 115: 158 I.C. 282; *Abdul Jalil Khan v. E.*, 128 I.C. 593: 1930 A. 746: 32 Cr. L.J. 152; *Khilawan v. E.*, 112 I.C. 337: 1928 O. 430: 29 Cr. L.J. 1009; *Teka Ahir v. E.*, 60 I.C. 331: 22 Cr. L.J. 219.

40. *Cockle's Cases and Statutes*, 4th Ed., 117.

41. See *Stirland v. Director of Public Prosecutions*, 60 T.L.R. 461.

character in defence.⁴² The answer to a question concerning the character of an accused person is not inadmissible under section 54 when the question is asked, not with the object of showing what sort of character the prisoner has, but with a collateral object.⁴³

Evidence of bad character may become relevant under sections 14 and 15.—Cases are conceivable where evidence of bad character may become relevant under the provisions of sections 14 and 15.⁴⁴ Generally, evidence adduced to prove that an accused person has committed acts which are not the subject of charges in a trial is irrelevant and must be excluded unless it is otherwise relevant, and greatest care ought to be taken to reject such evidence unless it is plainly necessary to prove something which is really in issue. Evidence of defalcations, both prior or subsequent to those for which an accused is being tried, whether such defalcations formed the basis of another charge on which the accused may have been acquitted or not, are admissible in evidence to prove guilty intent as also to anticipate the defence of the non-existence of such intent.⁴⁵ In cases of crime where it is thought desirable by the prosecution to bring evidence of previous conduct of similar character to the suggested crime before the jury, the intention of section 54 is not infringed and evidence pointing to directly similar conduct is admissible.⁴⁶ See notes to section 14 and 15.

Previous conviction; Explanation II.—Before the amendment of this section by Act III of 1891, a previous conviction was always relevant against the accused person, but general evidence of bad character was admitted only if the accused gave evidence of good character.⁴⁷ Under the section in its present form, a previous conviction becomes relevant as evidence of bad character when the accused gives evidence of good character, or when the bad character of the accused is a fact in issue, e.g., in security proceedings under Chap. VIII of the Criminal Procedure Code. This section does not affect the relevancy of a previous conviction under some other section of the Act, as the section does not say that a previous conviction is never relevant unless bad character is relevant or is in issue⁴⁸; and previous convictions have been received in evidence under the other provisions of the Act. Thus, where the accused is liable to enhanced punishment by reason of the provisions of section 75 of the Indian Penal Code, a previous conviction may be proved as a fact in issue under section 5. When the previous commission by the accused of an offence is relevant within the meaning of section 14, the previous conviction of the accused also becomes a relevant fact.⁴⁹ In *E. v. Alloomiya Husan*⁴⁸ Aston, J. admitted evidence of a previous conviction under section 11, but in an earlier case,⁵⁰ it was remarked that section 11 is limited

42. *Khilawan v. E.*, 112 I.C. 337; 1928 O. 430; 29 Cr. L.J. 1009.

43. *Nitai Koley v. E.*, I.L.R. (1939) I.C. 337.

44. See notes to sections 14 & 15.

45. *E. v. Stewart*, 97 I.C. 1041; 1927 S. 28; 27 Cr. L.J. 1217.

46. *Raikhon Boro v. E.*, 1936 C. 469; 166 I.C. 364.

47. *Q.E. v. Kartick Chunder Das*, 14 C. 721 (F.B.), dissenting from Roshun Doosadh, 5 C. 768, where

it had been held that, except in exceptional circumstances, the proper use of a previous conviction was to determine the amount of punishment.

48. *E. v. Alloomiya Husan*, 28 B. 129, per Aston, J.

49. Expl. 2 to section 14. See as to this, notes to Expl. 2 to section 14.

50. *Reg. v. Parbhudas Ambaram*, 11 Bom. H.C. 90.

in its effect by the present section. A previous conviction may also become relevant under section 8 as showing motive.¹

Explanation II.—If a habitual thief is found in the company of a gang of dacoits, and it is established that he knew that the said gang was habitually committing dacoity, it may be reasonably inferred that his association with them was not casual but that he joined the gang for the purpose of habitually committing dacoity, unless there are other circumstances connected with his association with the gang which would support a contrary view. Apart from the evidence of habit and character, previous conviction may also be admissible for the purpose of proving association of group of individual.² This view, however, is too broadly stated. The fact in issue, in a charge under section 401, I.P.C., is a particular trait of bad character namely association for the purpose of habitually committing robbery and theft. Evidence can be given of only that particular trait of bad character but not of general bad character, e.g., that the accused is a murderer or a cheat.³ It is an elementary principle of criminal law that a prisoner on his trial ought not to be prejudiced by statement of a previous conviction suffered by him. Previous convictions are no doubt made admissible by Explanation II, but they cannot be admitted to prejudice the trial. It is an elementary principle of criminal jurisprudence that the previous convictions of the accused are not relevant and cannot be proved, unless his good character is relevant under this section or unless an enhancement of sentence is sought for under section 75, Indian Penal Code.⁴

Previous convictions for specific offences, whether admissible in trials of gang cases under section 400 or section 401, I. P. Code?—Where the charge against the accused persons is that of belonging to a gang of persons associated for the purpose of habitually committing dacoity,⁵ evidence of previous convictions of the specific offence of dacoity is relevant⁶ under section 14 of the Evidence Act. Evidence of previous convictions of specific offences of theft and of being bound over under section 110, Cr. P. Code, is also, according to the general trend of authorities, relevant to show habit and association.⁷ Such evidence is not strictly speaking,

1. Woodroffe, Ev., 9th Ed., 476; Jagwa Dhanik v. E., 5 P. 63: 93 I.C. 884: 1926 P. 232: 27 Cr. L.J. 484; Samaruddin v. E., 40 C. 367: 17 I.C. 565: 13 Cr. L.J. 821; E. v. Naba Kumar Patnaik, 1 C.W. N. 146.

2. Bhimashaw v. State. 1956 Orissa 177.

3. Baichaturi v. State, A.I.R. 1960 Guj. 5.

4. Kamya In re, A, 1960 Cr. L.J. 1302.

5. Section 400, I.P. Code.

6. Amdumiyar Patel v. E., 1937 N. 17; Bachchu v. E., 128 I.C. 739: 1930 O. 455: 32 Cr. L.J. 162; Nidhi v. E., 83 I.C. 683: 1925 O. 144: 26 Cr. L.J. 123; E. v. Sher Mahomed, 46 B. 958: 75 I.C. 67: 1923 B. 71: 24 Cr. L.J. 867; E. v. Naba Kumar Patnaik, 1 C.W.

N. 146.

7. Amdumiyar Patel v. E., 1937 N. 17; Beni Madho v. E., 146 I.C. 1064: 1933 O. 355: 35 Cr. L.J. 273; Khilawan v. E., 112 I.C. 337: 1928 O. 430: 29 Cr. L.J. 1009; Ledu Molla v. E., 52 C. 595: 87 I.C. 925: 1925 C. 872: 26 Cr. L.J. 1037; Nidhi v. E., 83 I.C. 683: 1925 O. 144: 26 Cr. L.J. 123; Kader Sundar v. E., 13 I.C. 279: 13 Cr. L.J. 39; Bonai v. E., 38 C. 408: 9 I.C. 555: 12 Cr. L.J. 97; see also Bhurasing v. E., 1935 S. 115: 158 I.C. 282; Lale v. E., 118 I.C. 423: 1929 O. 321: 30 Cr. L.J. 922; contra. E. v. Sher Mahomed, 46 B. 958: 75 I.C. 67: 1923 B. 71: 24 Cr. L.J. 867; Public Prosecutor v. Bonigiri Pottigadu, 32 M. 179: 2 I.C. 307: 9 Cr. L.J. 567.

evidence of bad character only, but is evidence of a fact in issue, i.e., association, and section 54 does not prevent evidence of a fact in issue or a relevant fact being given even if the evidence incidentally shows the bad character of the accused.⁸ One of the chief points to establish in a case of gang dacoity is association in crime; and if it can be proved that certain persons have joined together to commit burglaries as well as dacoities, the former fact is strong evidence of criminal association and is, therefore, relevant to show that they are members of the gang; and if that gang can also be shown to have been associated for the habitual commission of dacoities, evidence as to these burglaries may very well be relevant against the accused.⁹ If the charge against the accused is that of belonging to a gang of persons associated for the purpose of habitually committing thefts,¹⁰ previous convictions of theft and orders under section 110, Cr. P. Code, are undoubtedly relevant;¹¹ and a *fortiori*, convictions of dacoity also would be relevant.¹² Evidence showing the actual participation by an accused in any given theft or robbery is evidence both of his association with the gang and of his object in such association. Evidence which has not been believed for the purpose of a conviction under section 379 or section 392, I.P. Code, may yet be relied upon for the purpose of conviction under section 401, I.P. Code.¹³ But where the charge is neither under section 400 nor under section 401, I.P. Code, but is one of committing or conspiring to commit a particular dacoity, and the prosecution seek to prove that the object of the conspiracy was the commission of thefts and other discreditable acts, the evidence is not relevant either under section 54 or under section 14, though it is admissible for the limited purpose of corroborating the statement of the approver that a conspiracy in fact existed.¹⁴ Where a man is charged with committing a specific dacoity, evidence of previous acts of sabotage is not relevant.¹⁵ The position is, however, otherwise where the charge against the accused is that of making preparations to commit a dacoity. In such a case the fact that any one of the accused persons had been previously concerned in a similar transaction would be relevant.¹⁶ Evidence of offences committed after those charged is not admissible, whether the prosecution be under section 400 or under section 401, Indian Penal Code.¹⁷

Proof of previous conviction under section 75, I. P. Code.—Since the evidence of previous conviction tends to prejudice the jury or the asses-

- | | |
|---|--|
| <p>8. Saroj Kumar Chakravarty v. E., 59 C. 1361: 139 I.C. 873: 1932 C. 474: 33 Cr. L.J. 854; see also Lale v. E., 118 I.C. 423: 1929 O. 321: 30 Cr. L.J. 922; Khilawan v. E., 112 I.C. 337: 1928 O. 430: 29 Cr. L.J. 1009.</p> <p>9. Nidhi v. E., 83 I.C. 683: 1925 O. 144: 26 Cr. L.J. 123.</p> <p>10. Section 401, I.P. Code.</p> <p>11. Baksho v. E., 126 I.C. 468: 1930 S. 211: 31 Cr. L.J. 1046; Lale v. E., 118 I.C. 423: 1929 O. 321: 30 Cr. L.J. 922; E. v. Sher Mahomed, 46 B. 958: 75 I.C. 67: 1923 B. 71: 24 Cr. L.J. 867; E. v. Tukaram Malhai, 15 I.C. 811: 13 Cr. L.J. 539; Bonai v. E., 38 C. 408: 9 I.C. 555: 12 Cr. L.J. 97;</p> | <p>contra Mankura Pasi v. Q.E., 27 C. 139.</p> <p>12. Moti Ram Hari v. E., 89 I.C. 527: 1925 B. 195: 26 Cr. L.J. 1391.</p> <p>13. Bachchu v. E., 128 I.C. 739: 1930 O. 455: 32 Cr. L.J. 162; Lale v. E., 118 I.C. 423: 1929 O. 321: 30 Cr. L.J. 922; but see Khilawan v. E., 112 I.C. 337: 1928 O. 430: 29 Cr. L.J. 1000.</p> <p>14. Wahiduddin Hamiduddin v. E., 54 B. 524: 127 I.C. 189: 1920 B. 157: 31 Cr. L.J. 1168.</p> <p>15. Goma Ram v. E., 1945 B. 152.</p> <p>16. Khwaja Hassan v. E., 71 I.C. 360: 24 Cr. L.J. 136. This case is open to doubt.</p> <p>17. See E. v. Naba Kumar Patnaik, 1 C.W.N. 146.</p> |
|---|--|

sors against the accused,¹⁸ section 310, Criminal Procedure Code, provides that when the accused is charged with an offence and further charged that he is, by reason of a previous conviction, liable to enhanced punishment, such further charge shall not be referred to by the prosecution, nor any evidence adduced thereon, until the accused has been convicted, or the jury or the assessors have given their opinion. It is illegal during the course of the trial of an accused person to record evidence of a previous conviction. Such evidence amounts to evidence of bad character and is expressly forbidden by section 54 of the Evidence Act, unless and until the accused offers evidence of good character.¹⁹ When a previous conviction is charged against an accused person under section 310, Criminal Procedure Code, it cannot be treated as substantive evidence of the principal offence, and the Magistrate should not allow himself to be guided in his decision by the fact that the accused has one or more previous convictions against him.²⁰ When a previous conviction is sought to be given in evidence against the accused, it must be strictly proved.²¹

Character of the prosecutor.—The prosecutor stands on the same footing as any ordinary witness in a criminal case; his credit may, therefore, be impeached in the same manner as the credit of any other witness, e.g., by proof of his general untrustworthiness. In a prosecution for rape, the Act specifically makes the general immoral character of the prosecutrix relevant.²² Under section 55 of the Act the character of the plaintiff has been specifically made a fact in issue for the purpose of ascertainment of damages, but no such provision has been made in regard to the character of the prosecutor or complainant in a criminal case. Reputation of the complainant is not a necessary fact to be proved in a charge under section 499 of the Indian Penal Code and hence it does not become a fact in issue.²³ It has been held in *Munnalal v. D. P. Singh*²⁴ that in a criminal prosecution for defamation, the accused is entitled to rebut the complainant's case that the alleged imputation was likely to harm his reputation. He can do that by showing that the complainant's reputation was already at a low ebb.

55. In civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

Explanation.—In sections 52, 53, 54 and 55 the word "character" includes both reputation and disposition, but

18. *Maung E Gyi v. E.*, 1 R. 520: 81 I.C. 106: 1924 R. 91: 25 Cr. L.J. 618.

19. *Teka Ahir v. E.*, 60 I.C. 331: 22 Cr. L.J. 219.

20. *Maung E Gyi v. E.*, 1 R. 520: 81 I.C. 106: 1924 R. 91: 25 Cr. L.J. 618; see also *Jagwa Dhanuk v. E.*, 5 P. 63: 93 I.C. 884: 1926 P. 232: 27 Cr. L.J. 484; *Baharuddin Mandal v. E.*, 22 I.C. 187: 15 Cr.

L.J. 43.

21. *E. v. Sheikh Abdul*, 43 C. 1128: 33 I.C. 825: 17 Cr. L.J. 185.

22. See section 155 (1).

23. *Devbrata Shastri v. Krishna Ballabh*, 1954 P. 84; wherein *Laidman v. Hearsey*, 7 A. 906; *Devi Dial v. King Emperor*, 1923 L. 225; *Munnalal v. D. P. Singh*, 1950 A. 455 not followed.

24. 1950 A. 455: 51 Cr. L.J. 964.

²⁵[except as provided in section 54] evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

COMMENTARY

Character evidence in suits for damages.—This section is superfluous, inasmuch as the rule enacted by it can also be deduced from the wider provisions of section 12. In a case where damages are claimed, the amount of damages is always a fact in issue; hence, any fact which enables the Court to determine this amount becomes relevant under section 12. It is not in every case of tort that character becomes material for the assessment of damages; for example, the amount of damages claimed for being bitten by a dog or for an injury caused by a railway accident does not in any way depend on the character of the plaintiff, and therefore character evidence in cases of this kind would not be relevant. The section does not say that in every suit for damages the character of the plaintiff becomes relevant, but contemplates only such cases where, by the substantive law applicable to the case, the character of the plaintiff would influence the Court's opinion as to the amount of damages that he should receive. In suits for damages for adultery or seduction, evidence concerning the character of the wife or the seduced person is not relevant under the present section, which is limited in its application to the evidence of the character of the plaintiff. Such evidence is, however, relevant under section 12.

Cases where bad character of the plaintiff affects the amount of damages.—The bad character of the plaintiff affects the amount of damages in the following three cases:—(1) in suits for damages for defamation, and in prosecutions for defamation, evidence of the bad character of the plaintiff or the prosecutor is admissible in mitigation of damages and fine,²⁶ but evidence of rumours and suspicions of bad character cannot be received;²⁷ (2) in actions for breach of promise to marry, the defendant is entitled to prove that the plaintiff is a person either of bad character or of coarse and brutal manners;²⁸ (3) in a claim for damages against an alleged adulterer, the defendant may prove that the plaintiff has been guilty of notorious infidelity or has otherwise been guilty of dissolute conduct.²⁹

Plaintiff's good character, whether relevant?—In England the plaintiff, in a suit for damages, cannot give evidence of his good character in aggravation of damages; but if the defendant has given evidence of his bad character, the plaintiff may give evidence of good character to rebut the evidence of bad character.³⁰ Under the present section it would ap-

25. Inserted by the Indian Evidence Act (1872) Amendment Act, 1891 (3 of 1891), section 7.

26. *Samrathmal v. E.*, 141 I.C. 436: 1932 N. 158: 34 Cr. L.J. 154; *Devi Dial v. E.*, 4 L. 55: 73 I.C. 805: 1923 L. 225: 24 Cr. L.J. 693; *The Englishman, Ltd. v.*

Lajpat Rai, 37 C. 760: 6 I.C. 81: Taylor, § 359.

27. *The Englishman, Ltd. v. Lajpat Rai*, 37 C. 760: 6 I.C. 81.

28. Taylor, § 358.

29. Taylor, § 358.

30. Taylor, § 362.

pear that evidence of good character of the plaintiff would be relevant as affecting the amount of damages.³¹

A bad general reputation can be proved but not rumours or suspicions. It is not open to give evidence of particular facts showing bad character or disposition. The section allows as admissible the evidence of general reputation and of general disposition, but not of particular facts or of traits.³²

Explanation; general reputation and general disposition.—According to the English rule as authoritatively laid down in *R. v. Rowton*,³³ evidence of character must be evidence of general reputation and not of disposition,³⁴ but the present section departs from the English law in this respect, inasmuch as it makes evidence of disposition equally admissible.

“Reputation” means what is thought of a person by others, and is constituted by public opinion; it is the general credit which a man has obtained in that opinion.³⁵ “Disposition”, on the other hand, means the witness’s individual opinion of a person’s character.³⁶ Under this section, evidence can be given of general reputation and general disposition only, and not of particular facts,³⁷ since isolated incident afford no presumption of a man’s general character and even “the most consummate villain may be able to prove that on some occasions he has acted with humanity, fairness or honour”.³⁸ Reputation must be distinguished from rumour. Evidence of rumour is mere hearsay evidence of a particular fact; evidence of repute is a different thing. A man’s general reputation is the reputation which he bears in the place in which he lives amongst all the townsmen, and if it is proved that a man who lives in a particular place is looked upon by his fellow townsmen, whether they happen to know him or not, as a man of good repute, that is strong evidence that he is a man of good character. On the other hand, if the state of things is that the body of his fellow townsmen who know him look upon him as a dangerous man and a man of bad habits, that is strong evidence that he is a man of bad character.³⁹ “It is possible for a man to have a fair reputation who has not in reality a good character, although men of really good character are not likely to have a bad reputation”.⁴⁰ Evidence of general repute does not offend against the rule against hearsay but is direct evidence of a man’s character.⁴¹

Relationship of the witness to the deceased is no ground for not acting upon that testimony if it is otherwise reliable in the sense that the witness was a competent witness who could be expected to be near about the place of occurrence and could have seen what happened that afternoon.⁴²

31. See *Field, Ev.*, 8th Ed., 392.

32. *Harbhajan Singh v. State of Punjab*, 63 P.L.R.

33. *R. v. Rowton*, 34 L.J.M.C. 57.

34. *Cockle's Cases and Statutes*, 4th Ed., 114.

35. *Woodroffe, Ev.*, 9th Ed., 480.

36. *Taylor*, § 350; *Woodroffe, Ev.*, 9th Ed., 480.

37. *Samrathmal v. E.*, 141 I.C. 438; 1932 N. 158; 34 Cr. L.J. 154;

Christensen v. Castor, 41 I.C. 696.

38. *Taylor*, § 351.

39. *Rai Isri Pershad v. Q. E.*, 23 C. 621.

40. *Crabb's Synonyhe* cited in *Field, Ev.*, 8th Ed., 398, footnote (3).

41. *Raghubar Dayal v. State of Punjab*, 120: 1934 A. 735: 36 Cr. L.J. 33.

42. *Gurcharan Singh v. State of Punjab*, 1958 Cr. L.J. 827.

NEW BOOKS FOR YOU AND YOUR LIBRARY

1	Malhotra : Dismissal, Discharge, Termination of Service and Punishment with Model Forms, 5th Ed 1976	48.00
2	Hargopal : The Indian Draftsman (Book on legal drafting) 3rd Ed. 1976	55.00
3	Monir Principles and Digest of the Law of Evidence Vol. 1, Volume 2	50.00 35.00
4	Agarwala : Compulsory Acquisition of Land in India. 4th Ed. 1974	70.00
5	Rattigan : Digest of Customary Law in the Punjab, Vol. 1, 15th Ed. 1977; 2nd Volume in the press	50.00
6	Roy : Gheraos, Strikes and Lockouts, 1969 Ed.	20.00
7	Mehra : The Factories Act with Rules, edition 1971	15.00
8	U. P. Industrial Disputes Manual, Edition 1973	15.00
9	Sarin : The Payment of Wages Act with State Rules, edition 1968	20.00
10	Malhotra : Digest of Bonus Cases with the Bonus Act, Rules and Forms 1972	30.00
11	Justice Malik : The Art of a Lawyer, Advocacy, Cross-Examination and Courtmanship, 2nd edition 1974	40.00
12	Roy : All India Services Manual, edition 1972	40.00
13	Roy : The Bombay Industrial Relations Manual, edition 1966	37.50
14	Roy : Bombay Shops and Establishments Act and Rules, edition 1966	8.00
15	Khanna : Law of Court-fees and Suits Valuation in India, Fifth Edition 1970	30.00
16	Roy : The Uttar Pradesh Govt. Servants Manual, Ed. 1972	30.00
17	Justice Khosla : Our Judicial System	7.50
18	Gupta : Industrial Employment (Standing Orders) Act, 1946	10.00
19	Mehra : The Workmen Compensation Act with Rules	15.00
20	Malhotra : Law relating to Industrial Adjudications, Ed. 1967	18.00
21	Gupta : Employees State Insurance Act with Rules, Ed. 1967	12.50
22	Roy : Rules and Orders rel. to Govt. Servants and their Dismissal, 7th Edition 1967	12.50
23	Jagdish Swarup : Interpretation of Indian Statutes	30.00
24	Aiyar : Sale of Goods Act, 2nd Edition 1967	15.00
25	Roy : Central Civil Services (C.C.A.) and C.C.S. (Conduct) Rules with Notes, Second Ed. 1971	9.00
26	The Contract Labour (Regulation and Abolition) Act, 1970 with Central Rules, 1971 and Digest of Case Law	6.50
27	Aiyar : Societies Registration Act, 3rd Edition 1966	7.50
28	Malhotra : Payment of Bonus Act with Rules, etc. 1972	12.50
29	Gulati : Banking Companies Act, 1965	15.00
30	Mehra : Handbook of Drug Laws, Third Edition 1978	70.00

THE UNIVERSITY BOOK AGENCY

Elgin Road — Post Box 63 — Allahabad 211 001